Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-589

DANIEL CAHALANE and NEIL BYRNE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

DANIEL CAHALANE and
NEIL BYRNE,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on August 11, 1977.

CITATIONS TO OPINIONS BELOW.

The Opinion of the United States District Court for the Eastern District of Pennsylvania is printed in Appendix B hereto and is reported at 422 F. Supp. 147 (E. D. Pa. 1976). The Opinion of the Court of Appeals for the Third Circuit is not yet officially reported but is printed in Appendix A hereto.

JURISDICTION.

The Opinion and Judgment of the Court of Appeals was made and entered on August 11, 1977. Petitions for Rehearing En Banc were timely filed and denied by the Court of Appeals on September 21, 1977. By Order dated October 3, 1977, the Court of Appeals stayed its mandate pending the filing of this Petition. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

THE QUESTIONS PRESENTED.

1. WERE NOT PETITIONERS' RESPECTIVE PRIVILEGES AGAINST SELF-INCRIMINATION VIOLATED BY THE GOVERNMENT'S USE OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, WHICH IS A REGISTRATION STATUTE PROVIDING CRIMINAL PENALTIES FOR NONCOMPLIANCE BUT WHICH CONTAINS NO EXPRESS PROHIBITION ON EVIDENTIARY USE OF COMPELLED DISCLOSURES IN SUBSEQUENT CRIMINAL PROSECUTIONS, TO COMPEL PETITIONERS TO DISCLOSE THEIR AFFILIATION WITH THE IRISH NORTHERN AID COMMITTEE AT A TIME WHEN THE COMMITTEE WAS THEN THE FOCUS OF A CRIMINAL INVESTIGATION INTO UNLAWFUL MUNITIONS EXPORTATION, AND DID NOT THE LOWER COURT ERR IN PERMITTING THE GOVERNMENT TO INTRODUCE INTO EVIDENCE THE REGISTRATION FORMS FILED BY PETITIONERS AS PROOF OF THEIR RESPECTIVE AFFILIATION WITH THE COMMITTEE IN THIS PROSECUTION WHEREIN THE COMMITTEE WAS ALLEGED TO BE THE "HUB" OF THE CONSPIRACY CHARGED IN THE INDICTMENT?

2. WAS NOT THE COURT OF APPEALS' DENIAL OF PETITIONERS' MOTIONS TO DISMISS THE GOVERNMENT'S APPEALS FROM POST-VERDICT JUDGMENT OF ACQUITTAL ERRONEOUS AND INCONSISTENT WITH THIS COURT'S OPINION IN *UNITED STATES V. MARTIN LINEN SUPPLY CO.*, – U. S. – (1977)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE.

Petitioners were tried in the United States District Court for the Eastern District of Pennsylvania on a multi-Count indictment charging, as here relevant, a Conspiracy to export munitions without a license to Northern Ireland (the "Conspiracy Count") and substantive Counts charging specific events of aiding and abetting the unlicensed exportation of munitions to Northern Ireland (the "Substantive Counts").[1]

Jury verdicts of guilty were returned on June 21, 1976 as to both Petitioners on the Counts here relevant. Acting on Petitioners' post-trial motions, the District Court, on October 12, 1976, granted Judgment of Acquittal on the Substantive Counts, finding that the "Government failed to produce one scintilla of evidence concerning the illegal exportation of the weapons described in the indictment" (422 F. Supp. at 160). On the Conspiracy Count, the lower court denied Petitioners' Motion and later sentenced both Petitioners to a prison term.

Petitioners appealed to the United States Court of Appeals for the Third Circuit from Judgment of Conviction on the Conspiracy Count. The Government likewise appealed from the post-verdict grant of Judgment of Acquittal on the Substantive Counts. These appeals, and others not directly pertinent, were consolidated and on August 11, 1977 the Court of Appeals affirmed Petitioners' conviction on the Conspiracy Count and reversed Judgment of Acquittal on the Substantive Counts.

---

1. As here relevant, the Conspiracy Count charged as the object of conspiracy a violation of regulations under 22 U. S. C. § 1934 and the Substantive Counts charged actual violations of such regulations relating to the prior issuance of an export license for the exportation of certain types of munitions.

REASONS FOR GRANTING THE WRIT.

1. The Government Improperly Used the Compulsory Registration Requirements of the Foreign Agents' Registration Act of 1938 to Require Petitioners to Disclose Their Affiliation With an Organization Alleged to Be the "Hub" of the Conspiracy Charged and the Trial Court Erred in Permitting the Government to Introduce Such Registration Forms Into Evidence Over Petitioners' Fifth Amendment Objection.

The Theory of the Government's case against Petitioners was that Petitioners had purchased quantities of weapons in the United States and, in a manner alleged in the indictment as unknown to the grand jury, caused or aided in the unlicensed exportation of these weapons to the Provisional Irish Republican Army in Northern Ireland.

Petitioners did not dispute at trial that they had purchased the munitions in question, nor is it disputed that many of the munitions were later received in Northern Ireland. Petitioners' defense to the indictment was that there was no evidence that the weapons were exported from the United States in violation of applicable licensing requirements nor that Petitioners had been knowing participants in an enterprise to unlawfully export firearms.

As recited in the opinions of both the District Court and Court of Appeals printed in the Appendix, the evidence of a plan to export illegally, to the extent such evidence was produced, was provided by the activities of numerous unindicted co-conspirators whose common link with Petitioners was their common membership in a New York based organization known as the Irish Northern Aid Committee, referred to as NORAID.

To establish that Petitioners were members of this organization, the Government successfully offered, over objection, registration statements filed by Petitioners pur-

suant to the Foreign Agents' Registration Act of 1938, 22 U. S. C. § 611 et seq. (N. T. 14-34-14-51). The District Court observed:

> "The Government introduced short form registration forms filed with the Department of Justice by the three defendants on trial to show motive, intent and means by which the conspiracy was effected, inasmuch as the documents evidenced that the defendants were officers of the Irish Northern Aid Committee." (422 F. Supp. at 165)

At trial, the District Court conducted a hearing outside the presence of the jury as to circumstances of how these forms came to be filed with the Department of Justice. Frank Durkan, Esquire testified for Petitioners (on Petitioners' Motion to exclude the registration evidence) that he had been counsel for the Irish Northern Aid Committee during the relevant time period and was familiar with the circumstances under which the Department of Justice required the Committee to register pursuant to the Foreign Agents' Registration Act of 1938 (N. T. 13-23-13-315). After a series of negotiations with the Department of Justice, the Committee ultimately registered as a foreign agent "under protest" (N. T. 13-294). Thereafter, litigation between the Committee and Department of Justice concerning the furnishing of membership lists and related documents, which is reported at *Attorney General v. Irish Northern Aid Committee,* 346 F. Supp. 1384 (S. D. N. Y. 1972), *aff'd.,* 465 F. 2d 1405, *cert. denied,* 409 U. S. 1080 (Marshall, Douglas and Brennan, JJ. dissenting from denial of Certiorari). During the progress of the litigation, the Department of Justice further demanded that officials of the various nationwide chapters of the Committee file "short form registration forms" revealing their affiliation with the

Committee. Negotiations concerning whether such forms would be filed progressed from June, 1972 to June, 1973. On December 18, 1972 this Court denied Certiorari in the related litigation and ultimately numerous persons, including Petitioners here, filed the short form registration forms with the Department of Justice. Mr. Durkan testified that "it was in direct compliance with this directive of the Justice Department that all of these forms were filed." (N. T. 13-296).

At trial, the Government successfully offered into evidence, over objection, the forms filed by Petitioners for the following purpose:

> THE PROSECUTOR: Your Honor, these documents are short form registration forms filed with the Department of Justice by the defendants Daniel Duffy, Neil Byrne and Daniel Cahalane.
>
> The documents evidence the fact that they are officers of the Irish Northern Aid Committee and that they engaged in fund-raising activities. The documents are offered for three purposes:
>
> To show motive, intent and means by which the conspiracy was effected. (N. T. 14-33).

Petitioners argued in the District Court, as argued here, that the admission of these documents violated Petitioners' Fifth Amendment privilege against self-incrimination and, in effect, resulted in an unconstitutional application of the Foreign Agents' Registration Act of 1938.

It is interesting to note that during the litigation in *Attorney General v. Irish Northern Aid Committee, supra,*

the Government represented to the District Court (in connection with its efforts to compel the Committee to open its books and records for inspection) that:

> "The Government will not send defendant's books and records or copies to the grand jury." (346 F. Supp. at 1384)

This representation was in response to the Committee's argument that the Department of Justice's interest in the Committee was to further a grand jury investigation then pending in Fort Worth, Texas and that compelled inspection of the records constituted a misuse of the Registration Act to aid a criminal investigation (346 F. Supp. at 1388).

But in the instant matter the violation of Petitioners' Fifth Amendment privilege is even more conspicuous. In demanding the filing of short form registration forms, the Department of Justice did not seek Committee records; instead, it demanded personal disclosures by the affected officers, including Petitioners.

As the record of the instant case makes clear, at the time the Department of Justice was compelling Petitioners to disclose their affiliation with the Committee, a criminal investigation was in full progress and, indeed, as revealed by Jenks Act materials furnished to Petitioners during trial, a substantial portion of the case later to be presented against Petitioners was already known to the Department of Justice when it required the filing of the short form registration forms.[2]

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2. Moreover, in June 1973, Petitioners Cahalane and Byrne were themselves subpoenaed before a Federal Grand Jury investigating the activities which later became the subject matter of this indictment. The Government subsequently proffered an immunity Order as to Petitioner Cahalane. See *U. S. v. Doe, In Re:* Cahalane, 361 F. Supp. 226 (E. D. Pa. 1973), *aff'd. by Mem. Order,* 485 F. 2d 678 (3rd Cir. 1973).

These subpoenas were issued in the aftermath of this Court's denial of Certiorari in the aforementioned case.

Further, this evidence was not merely incidental to Petitioners' prosecution. Their affiliation with the Committee was the principal justification offered by the Government for the introduction of numerous co-conspirator statements concerning events happening throughout the United States over several years.

Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965) held that orders requiring members of the Communist Party to register as individual members of the party violated their Fifth Amendment privilege against self-incrimination, even though the Subversive Activities Control Act contained a provision that the fact of registration could not be received in evidence against a registrant in any prosecution for violating any criminal statute. Proceeding on the rationale that mere association with the Communist Party presented a sufficient threat of prosecution to support a claim of privilege (citing *Blau v. United States,* 340 U. S. 159), this Court concluded that personal registration could not be compelled.

In *Marchetti v. United States,* 390 U. S. 39 (1968), *Grosso v. United States,* 390 U. S. 62 (1968) and *Haynes v. United States,* 390 U. S. 85 (1968), this Court held various registration statutes effectively violated potential registrants' privileges against self-incrimination where registration presented a real hazard of self-incrimination.

In the present case, the Government used, or more accurately misused, the registration provisions of the Foreign Agents' Registration Act to gather evidence for ultimate use in a criminal prosecution. Truly, the Government's misuse of this Act placed Petitioners in a position which this Court should hold is protected by the core interests of the Fifth Amendment. On one hand, if Petitioners did not comply with the Justice Department's "directive" to file short form registrations revealing their

affiliation with the Irish Northern Aid Committee, they were exposed to criminal prosecution under that Act for failure to comply with its provisions (22 U. S. C. § 618). On the other hand, compliance with the Act resulted in the furnishing of information ultimately used to convict Petitioners in the present prosecution.

The Foreign Agents' Registration Act contains no express prohibition on use of compelled disclosures in a criminal prosecution. Thus, the Government successfully used one statute to obtain information from Petitioners, and another to prosecute them based, in part, on the compelled disclosures.

It is urged that the Court grant certiorari to review the significant constitutional issue presented.

2. The Court of Appeals' Denial of Petitioners Motions to Dismiss the Government's Appeals From Post-Verdict Judgment of Acquittal Was Erroneous and Inconsistent With This Court's Opinion in United States v. Martin Linen Supply Co., — U. S. —.

Petitioners were convicted by the jury on both the Conspiracy Count and the Substantive Counts. The lower court denied all requested post-trial relief with respect to the Conspiracy Count, but granted Petitioners' motions for judgment of acquittal on the Substantive Counts (422 F. Supp. 147). The Government appealed the granting of judgment of acquittal and ultimately prevailed in the Court of Appeals, resulting in Petitioners' jury convictions on the Substantive Counts being reinstated and the cause being ordered remanded for sentencing on the Substantive Counts (which has been stayed for pending the filing of this Petition).

Relying in principal part upon this Court's decision in *United States v. Wilson*, 420 U. S. 332 (1975), the Court

of Appeals rejected Petitioners' motion to dismiss the Government's appeals, which motion had argued that a post-verdict order granting judgment of acquittal was not appealable by the Government under 18 U. S. C. § 3731 and was violative of the Double Jeopardy Clause.

In his concurring opinion in *United States v. Martin Linen Supply Co.*, — U. S. — , 51 L. Ed. 2d 642, 654 (1977), Mr. Justice Stevens correctly observed that *Wilson, supra,* is not authority for the proposition that the Government may appeal from an acquittal. Beginning with the proposition that "There is no statutory authority for a government appeal from judgment of acquittal in a criminal case" (51 L. Ed. 2d at 654), Mr. Justice Stevens said in Footnote 1 to his opinion:

> The contrary dictum in United States v. Wilson . . . is not controlling for these reasons: First, the statutory issue was not in dispute in any of those cases. . . . Second . . . it is perfectly clear that the dictum is incorrect. In view of our special responsibility for supervising the proper functioning of the federal criminal justice system, we should not hesitate to correct a plain mistake involving a technical problem of procedure when there has been no prejudicial reliance on that mistake. (Footnote 1 at 654)

Moreover, as Petitioners understand the opinion of the Court in *Martin Linen,* authorized by Mr. Justice Brennan, this Court no longer subscribes to the broad dictum in *Wilson* that 18 U. S. C. § 3731 authorizes a governmental appeal from an acquittal as long as appellate relief for the Government will not subject criminal defendants to another trial on the merits. Rather, as Petitioners view Mr. Justice Brennan's opinion, a governmental appeal is not authorized by § 3731 if the acquittal by the

Court is based on an analysis of the facts presented at trial and a conclusion that, on the merits, the evidence was not sufficient to allow a jury to convict.

There can be no question in the instant case that the lower court's entry of judgment of acquittal was based on a comprehensive analysis of the facts and a conclusion that the "Government failed to produce one scintilla of evidence concerning the illegal exportation of the weapons described in the indictment" (422 F. Supp. at 160).

In seeking to dismiss the Government's appeals in the present matter, Petitioners raised both the statutory issue concerning the proper interpretation of § 3731 and a constitutional claim under the Double Jeopardy Clause.

The instant case presents a proper procedural background for consideration of whether *Wilson* applies to a post-verdict grant of judgment of acquittal entered on the merits.

CONCLUSION.

For the foregoing reasons, petitioners respectfully request that a Writ of Certiorari be granted directed to the Court of Appeals for the Third Circuit for review of the decision of that Court in the instant matter.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

Nos. 76-2461, 76-2473,
76-2511/12,
76-2565/66 and
77-1173

—

UNITED STATES OF AMERICA

v.

DANIEL CAHALANE, et al.

Daniel Cahalane, Appellant in 76-2461
Neil Byrne, Appellant in 76-2473
United States, Appellant in 76-2511/12
Daniel Cahalane, Appellant in 76-2565
Neil Byrne, Appellant in 76-2566
Neil Byrne, et al.,
Appellants in 77-1173

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Crim. No. 75-773)

—

Argued June 7, 1977

Before: WEIS, *Circuit Judge*, CLARK,* *Associate Justice* and GARTH, *Circuit Judge*.

* The Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States (Retired), sitting by designation, heard the oral argument and participated in the decision in this case but died before the opinion was written.

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OPINION OF THE COURT

(Filed August 11, 1977)

WEIS, *Circuit Judge.*

Although many issues are raised in these appeals, the principal contentions center on the sufficiency of the evidence. A jury returned verdicts against the defendants on charges of conspiracy and exporting arms and implements of war without a license. We conclude that the prosecution produced enough evidence to sustain the verdicts and the district court committed no reversible trial errors. Therefore, the judgment of sentence on the conspiracy count will be affirmed and the judgment of acquittal on the substantive counts will be vacated.

A jury convicted defendants Neil Byrne and Daniel Cahalane of both conspiracy and aiding and abetting the exportation of arms and ammunition to Northern Ireland without a license, in violation of 22 U. S. C. § 1934.[1] After hearing argument on post trial motions, the district court entered judgment of acquittal on the substantive counts, denied motions for a new trial, dismissed the challenges to the conspiracy conviction, and sentenced the defendants on that count. The defendants have appealed from the judgment of sentence, and the Government has appealed from the entry of acquittal as to the substantive counts pursuant to 18 U. S. C. § 3731.[2] In the latter case, the defendants have cross-appealed, asking for a new trial in the event that the judgment of acquittal is vacated.

The evidence in this lengthy trial is discussed in detail in the district court's opinion, *United States v. Byrne*, 422 F. Supp. 147 (E. D. Pa. 1976). We, therefore, will review the evidence in a more general fashion, taking it, as we must, in the light most favorable to the Government since the jury verdict was against the defendants. *Glasser v. United States*, 315 U. S. 60, 80 (1942); *United States v. Sica*, – F. 2d – (No. 75-2411, 3d Cir. July 7, 1977); *United States v. DeCavalcante*, 440 F. 2d 1264 (3d Cir. 1971).

1. The trial court dismissed three counts and a portion of the conspiracy count. Two other defendants, Conlon and Regan, were fugitives. The jury acquitted Daniel Duffy, another co-defendant, of all charges.

2. The trial judge granted the judgment of acquittal after the jury returned its guilty verdict. Therefore, a reversal of the judgment of acquittal would result in reinstating the jury's verdict without again placing the defendants in jeopardy. Since the Double Jeopardy Clause will not be violated, the government may maintain its appeal under 18 U. S. C. § 3731. United States v. Wilson, 420 U. S. 332 (1975). *See also* United States v. Martin Linen Supply Co., – U. S. –, 45 U. S. L. W. 4337 (U. S. April 4, 1977); United States v. Morrison, 429 U. S. 1 (1976); United States v. Davis, – F. 2d – (No. 76-1935, 3d Cir. Mar. 24, 1977).

Byrne, Cahalane and others in Pennsylvania and New York purchased Armalite semi-automatic, Lee-Enfield and Springfield rifles, M-1 carbines and armor piercing ammunition during the period 1970-1973. Some of these weapons were purchased packed in grease, a procedure appropriate for overseas shipment. The Armalite rifle is substantially the same as a U. S. Army M-16, capable of piercing flak vests and steel helmets at substantial distances. It also came equipped with a grenade launcher and a flash suppressor. The four named defendants (excluding Duffy) purchased about 360 weapons within one year at a cost exceeding $30,000 and over 100,000 rounds of ammunition. British authorities later seized approximately half of these weapons in Northern Ireland.

In addition to this activity in Eastern Pennsylvania, evidence established that Cahalane and Byrne worked with unindicted co-conspirators Martin Lyons and Francis Grady who lived in New York City. All four were officers of an organization known as the Irish Northern Aid Committee, NORAID, with Lyons acknowledged as a leader and the others having lesser roles. NORAID headquarters were located in the Bronx, where a local chapter functioned under Lyons' direction. NORAID engaged in various fund-raising activities and was also the center of the armament purchase and transportation efforts. A former NORAID member testified about his work in picking up, crating and transporting weapons for the organization.

Byrne and Cahalane traveled to Lyons' New York City residence in November, 1972, and January, 1973. Telephone records disclosed numerous calls between Lyons and Byrne, Lyons and Cahalane, as well as to NORAID headquarters by both Byrne and Cahalane. Byrne also negotiated with a Government informant for the purchase of rifles, machine guns, armor piercing ammunition, rocket

launchers and mortars. He told the informant that the arms would be shipped directly to Ireland from New York.

A government undercover agent testified that Lyons and others attempted to purchase anti-tank rockets, grenade launchers and automatic weapons. When the agent asked how he got them to Ireland, "he [Lyons] told me they crated it as plumbing stuff." Another NORAID member told a Government witness that Lyons had once disguised himself as a priest to get two trunks past customs and aboard a ship bound for Ireland. The Government also introduced evidence to show that neither Byrne, Cahalane nor Duffy had a license to export weapons.

The district court found sufficient evidence from which the Jury could reasonably find the existence of an agreement to export weapons without a license and the defendants' knowledge and participation in the conspiracy. The court, however, set aside the convictions on the substantive counts on the ground that the Government failed to show in what manner or by whom the specific guns described in the indictment were exported.

I.

The Conspiracy Count

Stressing the legality and "openness" of their munitions purchases, defendants contend that the Government produced no evidence of intent to participate in a plan of unlawful exportation. After a careful review of the record, the district court summarized the Government's case as establishing the existence of a conspiracy to export guns and ammunition without a license lasting over several years and involving more than a dozen persons. The evidence showed patterns of overt, as well as clandestine, efforts to purchase weapons to be shipped to Northern Ireland for the use of the IRA. According to defendant Duffy, "the

heat was on," and since "Scotland Yard is cooperating with the FBI," "they had to be very, very careful." [3]

The Government proved that the guns were purchased in this country and were traced to Northern Ireland. Exportation in fact occurred, and the circumstantial evidence was sufficient to allow the jury to find knowledge of an improper purpose, *United States v. Klein*, 515 F. 2d 751 (3d Cir. 1975), and an agreement to accomplish that result by exporting without a license. We find no error in the district court's determination upholding the jury verdict.

II.

The Substantive Counts

Conceding *arguendo*, in light of the verdict, the purchase of the arms and some manner of shipment to Ireland, the defendants contend that the Government failed to prove they aided and abetted an illegal exportation. The prosecution's case relied on circumstantial evidence and the inferences to be drawn from it. The issue, therefore, is whether the verdict was supported by inferences which could properly be drawn from the evidence. That the jurors understood the issue is revealed by a question they submitted to the trial judge during the course of deliberations:

> "If an individual fully, aware that the weapons he is buying are ultimately going to end up in Northern Ireland, believes that the weapons will leave the United States in a legal manner is he guilty of a conspiracy to have the weapons leave the country illegally?"

Although the inquiry was directed to the conspiracy count, the jury obviously recognized the importance of the manner of exportation. The district judge found that "the Government failed to produce evidence sufficient for the jury to find beyond a reasonable doubt that the offense of exporting firearms without a license was committed by anyone." Hence, finding no proof of the underlying crime's commission, he ruled there could be no conviction for aiding and abetting.

3. Though Duffy was acquitted by the jury, his admissions do not thereby become deleted from the record.

We do not agree that evidence of illegal exportation was lacking. The prosecution's case, though far from overwhelming, was enough to require jury consideration. The record establishes without doubt the defendants' possession of the rifles and ammunition in this country and the confiscation in Northern Ireland. According to the Government's theory, Byrne and Cahalane worked with Lyons and others in New York in purchasing arms to be smuggled out of that city to Northern Ireland. Taking inferences from the testimony in favor of the Government, as we are required to do at this stage of the case, *Glasser v. United States, supra, United States v. Sica, supra,* the jury could find that Lyons, in fact, had smuggled arms aboard a ship bound for Ireland, sometimes packing them as plumbing supplies. Since Lyons engaged in such subterfuges, it would be a reasonable inference that he, like the other defendants, had no license to export. If the defendants and other members of their group had been able to ship the supplies through a licensed exporter, there would have been no necessity for them to work with Lyons and his organization, nor to fear the cooperation of the FBI and Scotland Yard. Nor would it have been necessary for them to transport bulky weapons by car, rather than having the arms store ship them to an exporter.

In *United States v. Grady*, 544 F. 2d 598 (2d Cir. 1976), the defendant (an unindicted co-conspirator in the case *sub judice*) was convicted of unlawful exportation

under 22 U. S. C. § 1934 and 22 C. F. R. § 121-23 (1975). There, also, defendants contested the sufficiency of the evidence to prove the offense. The Court of Appeals for the Second Circuit affirmed the conviction, stating:

> "As to the lack of evidence claim, the short answer is that the entire scheme of purchase from Jankowski indicated that it was a clandestine undertaking to export firearms to Northern Ireland; from this the jury could have inferred that those associated with it would not seek an export license or use the services of a registered exporter, since either procedure would have involved the recording of information as to the disposition of the weapons." 544 F. 2d 598, 605 (2d Cir. 1976).

The court also recited evidence of the same event as in this case—Lyons disguising himself as a priest to ship some arms to Ireland. The evidence in the case *sub judice* is at least as strong as that in *Grady,* if not more so. There is more than evidence of clandestine activities—there are admissions from other NORAID members with whom defendants worked closely. *United States v. Trowery,* 542 F. 2d 623 (3d Cir. 1976).[4] Granting that the case is close, nevertheless the Government produced sufficient evidence to have the matter submitted to the jury. Since the verdict had support in the record, the district court erred in granting an acquittal.

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4. Hearsay evidence admissible under the co-conspirator exception may, of course, be considered in the substantive counts as well. 4 J. WEINSTEIN, EVIDENCE ¶ 801(d)(2)(E)[01]. In United States v. Mendoza, 473 F. 2d 692, 695 (5th Cir. 1972), the court said:

> "Nor is there any error in the court's refusal to exclude from the jury's consideration as to the substantive counts the evidence admitted under the co-conspirator exception in the hearsay rule. This exception is generally applicable to criminal prosecutions and not limited to prosecutions for conspiracy."

III.

ALLEGED AMENDMENT OF THE INDICTMENT

A month before trial, the Government wrote to the court, naming additional co-conspirators "among others, Eugene Marley, Martin Lyons, Francis Grady, Sean Keenan and Cornelius Buckley." The letter was inadvertently not sent to defense counsel, and they remained unaware of it until approximately ten days before the scheduled trial date of May 10, 1976. On May 5, the Government also submitted a list of twenty additional overt acts. Defendants, at a pretrial conference on that date, moved for a sixty day continuance, and after reviewing the matter, the trial judge granted a two week delay.

Defendants do not question the trial judge's action in limiting the time of the continuance, but rather contend that the additional overt acts amounted, in fact, to an amendment of the indictment. They allege that these overt acts, concerned with activities of Lyons and others in New York, added the New York activities to the Philadelphia operation described in the indictment. According to the defense, the Government sought to add evidence developed in its recently concluded Grady trial in New York.

The indictment charged that "the defendants would provide rifles and ammunition to persons to the Grand Jury unknown, to transport and export the aforesaid rifles and ammunition to the Irish Republican Army in Northern Ireland." The list of additional overt acts and co-conspirators supplied by the Government before trial was explanatory and descriptive rather than inconsistent or in addition to the charges in the indictment. The lists therefore do not constitute "amendments" to the indictment. *See United States v. Goldstein,* 502 F. 2d 526 (3d Cir. 1974).

The details were not at variance with the grand jury's understanding of the crime but constituted additional evidence of the general charge. Since the defendants had adequate time to make further investigation, prejudice is absent. Indeed, from the record it appears that defense counsel was not unaware of what had transpired in the Grady trial. The trial judge properly ruled that there was no amendment to the indictment, and his action in granting a continuance prevented any prejudice to defendants. *See United States v. Adamo,* 534 F. 2d 31, 38-39 (3d Cir. 1976), *cert. denied,* — U. S. —, 97 S. Ct. 116 (1977).

IV.

Repealer

Defendants argue that the repeal of 22 U. S. C. § 1934 and substitution of 22 U. S. C. § 2778 abates the prosecution in this case. 22 U. S. C. § 1934 (§ 414 of the Mutual Security Act of 1954) was repealed in Pub. L. 94-329, Title II, § 212(b)(1), June 30, 1976, 90 Stat. 745. The repealer provides that a reference to § 414 shall be deemed to be a reference to § 38 of the Arms Export Control Act, 22 U. S. C. § 2778, and references to licenses issued under § 38 of the Arms Export Control Act shall include licenses under § 414. The repealer provides further.

> "(2) All determinations, authorizations, regulations, orders, contracts, agreements, and other actions issued, undertaken, or entered into under section 414 of the Mutual Security Act of 1954 shall continue in full force and effect until modified, revoked, or superseded by appropriate authority."

Defendants contend that the preceding section does not include "prosecutions," and moreover, the instant cases were based on violations of the regulations, rather than the statute itself. We do not pass upon the Government's position that the regulations, rather than the statute, are controlling, although the regulations continued in effect. *See* Executive Order No. 11940, reprinted as a note to 50 U. S. C. App. § 2403. Moreover, there is evidence of congressional intent to continue limitation on arms exportation. *See generally,* 1976 U. S. Code Cong. and Adm. News, page 1378. However, in our view the General Savings Clause, 1 U. S. C. § 109, governs this case:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution . . . ."

See Warden v. Marrero, 417 U. S. 653 (1974). Here, the repealing statute does not express any intention to extinguish liability. To the contrary, it leads to the opposite conclusion. Accordingly, we reject the defendants' contention.

V.

Trial Errors

The defendants urge a number of trial rulings as reversible error:

1. The trial court erred in unduly restricting cross-examination of a prosecution witness, Nigro, and in declining to instruct the jury in evaluating his testimony.

Rule 608(b), Federal Rules of Evidence governs the scope of cross-examination, granting the trial court wide discretion in allowing testimony about actions of a witness

affecting his character for untruthfulness. We find no abuse of that discretion. The instruction which defense counsel submitted to the trial judge was untimely. *United States v. Tourine,* 428 F. 2d 865 (2d Cir. 1970), *cert. denied,* 400 U. S. 1020 (1971); *United States v. Ashton,* 399 F. Supp. 1192 (W. D. Pa. 1974), *aff'd,* 521 F. 2d 1399 (3d Cir. 1975), *cert. denied,* 424 U. S. 942 (1976). Moreover, the charge did caution the jury about the reliability of paid informer's testimony. Nigro's evidence obviously fell in that category.

2. The prosecutor's closing remarks were inflammatory.

The trial judge did not err in rejecting this contention. *United States v. Homer,* 545 F. 2d 864, 867-868 (3d Cir. 1976).

3. The trial court improperly admitted the testimony of co-conspirators.

The district court relied upon *United States v. Trowery, supra,* and *United States v. Trotter,* 529 F. 2d 806 (3d Cir. 1976). We find no error in the admission of the challenged statements.

4. The court erred in refusing to exclude the transcript of a telephone conversation recorded by the Government informant Nigro.

The court's ruling was within the discretion of the trial judge. We find no reversible error in admitting the transcript, despite the witness' earlier destruction of the magnetic tape.

5. Other evidentiary rulings cumulatively deprived the defendants of a fair trial.

Our review of the record does not substantiate this allegation and we find no error.

6. The presence of many rifles in the courtroom prejudiced defendants.

The guns were proper exhibits, and, in view of the nature of the case, could hardly be considered shocking or emotional. Moreover, it is well known that continued exposure to even emotion-arousing objects tends to reduce their effect. This was a lengthy trial, and the likelihood that the presence of the exhibits throughout it had any prejudicial effect is extremely speculative.

7. The court erred in refusing to marshall the evidence.

The defendants' complaint that the trial judge failed to marshall the evidence is somewhat unusual. A judge is free, if he chooses, to review the evidence providing he does so in a fair and impartial manner. *United States v. Gaines,* 450 F. 2d 186 (3d Cir. 1971), *cert. denied,* 405 U. S. 927 (1972); *cf. Ayoub v. Spencer,* 550 F. 2d 164 (3d Cir. 1977). However, it is not obligatory that he review the testimony, and, in the opinion of many trial lawyers and judges, it is better left undone. Judge Learned Hand wrote:

> "[I]n this country not only has the exercise of the power [to marshall the evidence] never been obligatory, but the power itself has been somewhat suspect. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded." *United States v. Cohen,* 145 F. 2d 82, 92-93 (2d Cir. 1944), *cert. denied,* 323 U. S. 799 (1945).

As the district judge in this case remarked: "The marshalling of the evidence is what counsel had done in summation to the jury." Extensive comment on the evidence by the trial judge usually leads to complaints of mistake, undue emphasis on one phase or another, or subtle indication to the jury of the judge's view on guilt or innocence. We find no merit in this contention of the defendants.

8. The court erred in failing to charge on multiple conspiracies.

We agree with the trial judge that this was not error since there simply was no evidence of anything other than one large conspiracy.

In summary, we find no reversible trial error.

VI.

Defendants' Cross-Appeals

Finally, we must dispose of a somewhat complicated procedural matter. On October 12, 1976, the district court ruled on various post-trial motions as follows: "[I]t is hereby Ordered and Decreed as follows:

1. The defendants' motion for arrest of judgment is Denied;

2. The defendants' motion for judgment of acquittal on Counts 4, 5, 9, 11, 13, 15 and 16 is Granted;

3. The defendants' motion for judgment of acquittal on Count 1 is Denied;

4. The defendants' motion for a new trial is Denied;

5. The defendants' motion to inspect the grand jury minutes is Denied."

The court sentenced defendants on the conspiracy count on October 27, 1976, and defendants appealed within the required ten days. Fed. R. App. P. 4. The Government, granted thirty days to appeal, did not file its appeal from the judgment of acquittal until November 10, 1976. On November 19, 1976, defendants filed a cross-appeal to the Government's case, and petitioned the district court for an extension of time because of "excusable neglect" under Fed. R. App. P. 4. The district court denied any extension of time, and defendants have also appealed this order.

Defendants argued that if we vacate the judgment of acquittal on the substantive counts, we should then proceed to review the district court's denial of their motion for a new trial [5] even though they have not been sentenced on the substantive charges. We conclude that we do not have jurisdiction to review their contentions. Defendants do not have the right to cross-appeal when the Government appeals under 18 U. S. C. § 3731, *see United States v. Long*, 534 F. 2d 1097, 1101 (3d Cir. 1976); *United States v. West*, 453 F. 2d 1351, 1353 n. 3 (3d Cir. 1972); *see also United States v. Olt*, 492 F. 2d 910 (6th Cir. 1974); *United States v. Halbert*, 436 F. 2d 1226 (9th Cir. 1970), and the order they seek to appeal is clearly interlocutory. *Berman v. United States*, 302 U. S. 211 (1937); *United States v. Mathews*, 462 F. 2d 182 (3d Cir.), *cert. denied*, 409 U. S. 896 (1972); *United States v. Rizzo*, 439 F. 2d 694 (3d Cir. 1971). Hence, the cross-appeals must be dismissed.

In the absence of a statutory right to appeal, the defendant's contentions can be considered by the reviewing

5. The district court's order does not clearly spell out whether its denial of defendants' motion for new trial applied only to the conspiracy count or to the substantive counts also. For purposes of this appeal, we assume the order applied to all counts.

court under the general rule that an appellee may rely on any ground in support of the judgment. *United States v. Moody*, 485 F. 2d 531, 534 (3d Cir. 1973); *see also United States v. Finn*, 502 F. 2d 938, 940 (7th Cir. 1974); *United States v. Halbert, supra.* This situation is not presented in the case *sub judice:* Defendants do not urge different grounds for affirming the judgment of acquittal, rather they seek reversal of the order denying a new trial. Nor may we review defendants' contentions under an analogy to the procedure employed in civil cases before the 1963 amendments to Fed. R. Civ. P. 50(c), *see Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940); *Zimmerman v. Mathews Trucking Corp.*, 205 F. 2d 837 (8th Cir. 1953), for these are criminal, not civil appeals.

Moreover, there are practical reasons for refusing to address defendants' contentions at this time. First, the defendants may, after sentencing, decide not to appeal. Second, if the district court imposes concurrent sentences, review may be declined under the concurrent sentence doctrine. *Benton v. Maryland*, 395 U. S. 784 (1969); *Hirabayashi v. United States*, 320 U. S. 81 (1943). If we were to find reversible error and order a new trial, that trial would have to proceed even if the district court had intended to impose concurrent sentences—a result of no gain to defendants, but wasteful of both judicial and defendants' resources.

The judgment of the district court will be affirmed as to the conviction on the conspiracy count. The judgment of acquittal on the substantive counts: Counts 4, 5, 9, 11, 13, 15, and 16, will be vacated and the matter will be remanded to the district court for further proceedings. The cross-appeals of the defendants at Nos. 76-2565 and 76-2566 will be dismissed.

APPENDIX "B".

UNITED STATES of America

v.

Neil BYRNE et al.

Crim. No. 75-773.

United States District Court,
E. D. Pennsylvania.

Oct. 12, 1976.

David H. Hopkins, Robert W. Merkle, Jr., Dept. of Justice, Crim. Div., Washington, D. C., for plaintiff.

Jack J. Levine, Philadelphia, Pa., for Neil Byrne.

Kenneth E. Smith, Burlington, N. J., for Daniel Cahalane.

Thomas Colas Carroll, Philadelphia, Pa., for Daniel Duffy.

Memorandum and Order.

BRODERICK, *District Judge.*

Presently before the Court are the motions of defendants Neil Byrne and Daniel Cahalane for Arrest of Judgment and/or for Judgment of Acquittal and/or for a New Trial. They have also moved for permission to inspect the grand jury minutes. After a lengthy four week trial, on June 21, 1976, the jury returned a verdict of guilty as

to defendants Byrne and Cahalane and a verdict of not guilty as to defendant Daniel Duffy [1] in connection with some counts of the twenty-three count Indictment. Both Byrne and Cahalane were found guilty on Count 1 which charged them with conspiracy to export firearms without a license; defendant Byrne also was found guilty on Counts 5 and 13 which charged him with exporting firearms without a license and aiding and abetting; defendant Cahalane also was found guilty on Counts 4, 9, 11, 15 and 16 charging him with exporting firearms without a license and aiding and abetting.[2]

Although the defendants have alleged numerous grounds on which they base their motions, we find that only their allegation that the evidence is insufficient to support a conviction on either the substantive counts of aiding and abetting the exportation of firearms without a license and on the conspiracy count raises substantial questions.

Sufficiency of the Evidence as to Conspiracy.

Both defendants were charged in the indictment with conspiracy to export firearms without a license in violation of 18 U. S. C. § 371 and 22 U. S. C. § 1934(c) [3] and the

1. Also named as defendants in the Indictment were Vincent Conlon and Thomas Regan, who are fugitives and were therefore not on trial at the time.

2. All three defendants were also charged with acting as an agent of a foreign government without prior notification to the Secretary of State in violation of 18 U. S. C. § 951. The Court granted the defendants' motion for judgment of acquittal at the close of the government's case as to the three Counts charging this offense.

3. 22 U. S. C. § 1934 provides in pertinent part:

(a) The President is authorized to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition, and implements of war . . . other than by a United States Government agency. The President is authorized to designate those

regulations promulgated thereunder, 22 C. F. R. Section 127.01.[4] The theory on which the government proceeded at trial was that although the facts and circumstances relating to the manner in which the firearms left the country were not known, the evidence and the inferences which can be drawn from it are sufficient for the jury to find beyond a reasonable doubt that the defendants conspired to export the firearms without a license.

The evidence produced at trial, viewed in a light most favorable to the government, *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); *United*

3. (Cont'd.)
articles which shall be considered as arms, ammunition, and implements of war . . . for the purposes of this section.

(b) As prescribed in regulations issued under this section, every person who engages in the business of manufacturing, exporting, or importing any arms, ammunition, or implements of war, including technical data relating thereto, designated by the President under subsection (a) of this section shall register with the United States Government agency charged with the administration of this section, and, in addition, shall pay a registration fee which shall be prescribed by such regulations.

. . .

(c) Any person who willfully violates any provision of this section or any rule or regulation issued under this section, or who willfully, in a registration or license application, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $25,000 or imprisoned not more than two years, or both.

4. 22 C. F. R. Section 127.01 provides in pertinent part:

It shall be unlawful for any person to export or attempt to export from the United States any of those articles on the U. S. Munitions List without first having obtained a license therefor, unless written approval was obtained from the Department of State or an exemption from this requirement is authorized by this subchapter.

All of the weapons charged in the indictment, which are identified by serial number, are on the United States Munitions List.

States v. Armocida, 515 F. 2d 29 (3d Cir. 1975), *cert. denied* 423 U. S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84, is sufficient to establish that the defendants had knowledge of a plan to export firearms without a license, entered into an agreement to further that plan, and performed acts to further the illicit purpose. Although the evidence is of a circumstantial nature, we find it sufficient to permit the jury to infer the existence of a widespread conspiracy to purchase arms and export them illegally to Ireland and the defendants' participation in it.

To support a conspiracy conviction, the government must show both an agreement and a specific intent to achieve some unlawful goal. *United States v. Klein,* 515 F. 2d 751, 753 (3d Cir. 1975). The defendants contend that under the facts of this case the evidence is insufficient to support a verdict of guilty as to the conspiracy count in that there is no evidence that a common purpose existed. In *United States v. Kates,* 508 F. 2d 308, 310-311 (3d Cir. 1975), the Third Circuit stated:

> It is well stated that the "gist" of a conspiracy is an agreement. However slight or circumstantial the evidence may be, it must, in order to be sufficient to warrant affirmance, tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged co-conspirators. Similarly, we have stated that the essence of a conspiracy is a "unity of purpose" or "common design." [Footnote omitted].

In explaining the nature of the agreement necessary to prove a conspiracy, the Third Circuit, in *Kates,* further stated:

> [A] formal agreement need not be established; rather, a defendant's involvement in the conspiracy may be inferred from circumstantial evidence. The Government need not show that the defendant participated in every transaction or even that he knew the identities of his alleged conspirators or the precise role which they played. Id. at 310. [Footnotes omitted].

The defendants also contend that neither defendant Byrne nor defendant Cahalane had any knowledge of the conspiracy's illicit purpose when they performed the acts described in the indictment and proved at trial. There is no question that in order to sustain a conviction for conspiracy the evidence must be sufficient for the jury to reasonably infer that the alleged conspirator had knowledge of the conspiracy's illicit purpose when he performed the acts in furtherance of the illicit purpose. This requirement is set forth by our Third Circuit in *United States v. Klein,* supra, in the following language:

To support a conspiracy conviction, the government must show both an agreement and a specific intent to achieve some unlawful goal. *United States v. DeCavalcante,* 440 F. 2d 1264, 1275 (3d Cir. 1971); *United States v. Borelli,* 336 F. 2d 376, 384 (2d Cir. 1964). We do not dispute that a party who associates himself with an ongoing conspiracy may become a party to that agreement, either expressly by agreement or implicitly by acts done in furtherance of that conspiracy. *Direct Sales v. United States,* 319 U. S. 703, 709, 63 S. Ct. 1265, 87 L. Ed. 1674 (1943); *United States v. Lester,* 282 F. 2d 750, 753 (3d Cir. 1960). At a minimum, however, it must be shown that such a person has knowledge of the conspiracy's illicit purpose when he performs acts which further that illicit purpose. *Direct Sales,* supra; *United States v. Salerno,* 485 F. 2d 260, 263 (3d Cir. 1973); *United*

> *States v. American Radiator & Standard Sanitary Corporation*, 433 F. 2d 174 (3d Cir. 1970). By acting in furtherance of the co-conspirators' goals with knowledge of the improper purpose, the jury can reasonably infer that the new member has achieved a tacit agreement with members of the ongoing conspiracy. Without knowledge of some improper purpose, the agreement, which is the heart of any conspiracy indictment, cannot be inferred from acts, even acts which further the purpose of the conspiracy. *United States v. Kates*, 508 F. 2d 308 (3d Cir. 1975). 515 F. 2d at 753. [Footnotes omitted].[5]

As the Court pointed out, such knowledge may be shown by circumstantial evidence "especially in a conspiracy case where direct evidence is likely to be scant." 515 F. 2d at 754. [Footnote omitted]. Furthermore, in the face of a guilty verdict, only "slight" evidence is required to link a particular defendant to an established conspiracy. *United States v. Hopkins*, 518 F. 2d 152 (3d Cir. 1975), citing *Kates*, 508 F. 2d at 310.

The evidence introduced by the Government establishes the existence of a conspiracy to export guns and ammunition without a license lasting over several years and involving more than a dozen persons. The Government proved that the defendants, along with the co-conspirators, purchased several hundred firearms and nearly 100,000 rounds of ammunition at a cost in excess of $25,000. Other evidence, primarily circumstantial, shows patterns of overt, as well as clandestine, efforts to purchase weapons to be shipped to Northern Ireland for the use of the Provisional Irish Republican Army (IRA). The fact that much of the evidence is circumstantial does not affect its probative value, for circumstantial evidence is indistinguishable from direct evidence insofar as the jury's fact-finding function is concerned. *United States v. Hamilton*, 457 F. 2d 95, 98 (3d Cir. 1972). "[E]vidence need not be inconsistent with every conclusion save that of guilt, provided it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." *Id.*, quoting *United States v. Giuliano*, 263 F. 2d 582, 584 (3d Cir. 1959). Examining the evidence in a light most favorable to the Government, we can summarize it as follows:

5. *See also United States v. Johnson*, 513 F. 2d 819, 823 (2d Cir. 1975).

Jeff Reh testified that he first met defendant Duffy in July of 1970 while they both worked as auto mechanics at Rudy Valentino Ford in Upper Darby, Pennsylvania. (N. T. 11-99). Duffy was emotionally involved in the struggle in Northern Ireland, and often became agitated when he read articles in the newspaper concerning the events in Northern Ireland. (N. T. 11-103; 11-117). Duffy, who knew that Reh was a member of the Army Reserves, asked Reh if he could obtain firearms, rocket launchers, hand grenades and ammunition for him that would be shipped to the people in Northern Ireland from New York. (N. T. 11-105; 11-107). According to Reh's testimony, Duffy said that money was no object because "they" had plenty of money. (N. T. 11-106). Duffy said that the money was raised at different dances and society-type affairs. (N. T. 11-106–107). Although Duffy mentioned the IRA, he said he was not a member because a person had to live in Ireland to be a member. (N. T. 11-108). Reh told Duffy that he could not supply the weapons Duffy requested, but put Duffy in touch with one of his friends, Jack Nigro. (N. T. 11-109). In August of 1972, Reh saw Nigro in a shopping center and told him that a co-worker was interested in obtaining weapons for money. (N. T. 11-110–111).

Nigro testified that as a result of the conversation with Reh, he received a call from Duffy on October 3, 1972. (N. T. 11-132). He had some discussion with Duffy concerning the possibility of Nigro's supplying "arms and stuff" on a large scale, but Duffy said he didn't want to discuss the matter on the phone. (N. T. 11-150–152). Duffy said that the "stuff" would leave the country, and that once received, it would leave the country in a week or ten days. (N. T. 11-152). Duffy also told Nigro that funds were available, (N. T. 11-152), but that he did not have the final word on anything. (N. T. 11-153). After a subsequent conversation about two weeks later, Nigro and Duffy arranged to meet on October 20, 1972, outside of Duffy's place of employment. (N. T. 11-154–155). At that time Duffy said they wanted Armalite rifles, Colt AR-15's and rifles that could penetrate British flak vests and rocket launchers and mortars to use against the British tanks and armored cars. (N. T. 11-156). Nigro testified that Duffy said he was working for the IRA and cooperating with the Irish Northern Aid Committee in purchasing firearms. (N. T. 11-157). Duffy said that there were funds available from the Irish Northern Aid Committee to purchase arms and that he would speak to someone from New York whom he identified as "the General" about the firearms purchase. (N. T. 11-157). Nigro testified that Duffy said that he had purchased weapons in the past using identifications of recently deceased Irishmen. (N. T. 11-158). Duffy said they had previously used air freight, but were now running into problems with customs and were using ships out of New York to take the arms directly to Ireland. (N. T. 11-158). Duffy also said that they had to be very careful because Scotland Yard was cooperating with the FBI and "the heat was on." (N. T. 11-159).

At this meeting, they agreed that Nigro should meet "the General" from New York. (N. T. 11-159). Duffy called Nigro the following week, saying that he had arranged a meeting for November 6, 1972 between Nigro and a man from Warminster. (N. T. 11-159). At that meeting, Duffy introduced defendant Byrne as a very high ranking member of the IRA. (N. T. 11-163). Byrne said that the arms he wished to purchase were for his homeland and would be shipped directly to Ireland through New York. (N. T. 11-165; 11-170). When discussing payment for the arms, Byrne said that he had $50,000 earmarked for arms purchases which could be procured from New York on a day's notice. (N. T. 11-169). Nigro's last communication with Duffy was several weeks after this meeting when Duffy called to ask Nigro why he hadn't gotten back to him. (N. T. 11-173). Nigro said that he hadn't located anything yet and would call him. (N. T. 11-173).

John Rugg, the General Manager of Century Arms, Incorporated, a wholesale firearms dealer, testified that he sold Lee Enfield rifles and ball ammunition to Marjorie Palace, an unindicted co-conspirator who did business as a retail firearms dealer under the name of Palace Firearms. (N. T. 2-1–5; 2-192). Palace testified that she and her husband sold firearms from their home in Morrisville, Pennsylvania (N. T. 3-120), and that she sold firearms and ammunition to defendants Byrne and Cahalane (N. T. 3-139; 3-181), as well as to other co-conspirators. (N. T. 3-176; 3-180). She testified that her records showed that she had sold 5 rifles to Byrne, 25 to Cahalane, 33 to Regan, and 140 to Conlon, making a total of 203 rifles purchased by the defendants and the co-conspirators from Palace Firearms. Rugg testified that Palace told him that she was selling these guns to collectors who preferred the rifles to

be left in their original grease. (N. T. 2-131; 3–7). Rugg testified that rifles are put in grease for long periods of storage or for overseas shipment. (N. T. 2-131). Frank Moyer, an agent with the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms (ATF), who was qualified as a firearms expert, testified that wholesalers do not customarily pack firearms in grease for distribution to dealers in the United States, and that packing a firearm in grease would be appropriate for overseas shipment. (N. T. 9-185). Palace told Rugg that she was in a hurry for a delivery because Palace Firearms had been advertising a sale in a newspaper. (N. T. 3-4).

Robert Smith, a firearms dealer, testified that he sold armor-piercing ammunition to Palace. (N. T. 3-13). This ammunition was later sold by Palace to the co-conspirators. Palace told Smith that she wanted the armor-piercing ammunition because she had a contract with a police department in Trenton or Camden, New Jersey to supply ammunition for training purposes, for which a Federal grant had been issued. (N. T. 3-17–18; 3-40). Fred Ecker, a lieutenant with the New Jersey State Police in the purchase and property control unit stationed in West Trenton, New Jersey, testified that the New Jersey State Police never used armor-piercing ammunition and never had a contract with Mrs. Palace to acquire such ammunition. (N. T. 3-45; 3-51). Dominic Limone, a training supervisor of the Police Academy of the Trenton, New Jersey State Police Department, testified that the police never used armor-piercing ammunition and never contracted with Mrs. Palace for that ammunition. (N. T. 3-52–53). Richard Taylor, a sergeant in charge of the training bureau of Hamilton Township Police Department, which township is a suburb of Trenton, New Jersey, testified that the Police Department had never entered into a contract with Mrs.

Palace to acquire armor-piercing ammunition. (N. T. 3-53–54). Robert Plaag, a Captain of the Police Department of Ewing Township, which is adjacent to Trenton, New Jersey, testified that he had no dealings with Mrs. Palace concerning the supply of armor-piercing ammunition and that the Police Department never used armor-piercing ammunition. (N. T. 3-55–56). Edward Hahn, a sergeant in charge of property management, equipment and supplies for the Camden, New Jersey Police Department, testified that the Camden Police Department has not ordered armor-piercing ammunition for the past ten years, he never observed any police department in the Camden area using armor-piercing ammunition, and that he had never heard of Mrs. Palace. (N. T. 3-95–97).

Palace testified that she assumed the weapons purchased were going to be used by a gun club. (N. T. 4-56). Frank Moyer, the firearms expert, testified that the Armalite AR-180 is a semi-automatic weapon not used for sport and is particularly suitable for urban combat situations. (N. T. 9-174; 9-183). He testified that its effective accurate range is about 450 yards, that its maximum effective range is about 1800 yards, and that it will disintegrate a cinder block wall. (N. T. 9-178). He testified that the Lee Enfield Number 4 Mark I is a popular military weapon not used for hunting. (N. T. 9-182–184).

Marie Hallowell, bookkeeper at Montgomery Loan Company, a firearms and sporting goods store, testified that Conlon, Byrne and Cahalane came into the store together on several occasions to purchase Armalite AR-180 weapons. (N. T. 2-79–83). She testified that payment was made in cash. (N. T. 2-84). The firearms records of Montgomery Loan show that it sold 21 weapons to Byrne, 94 weapons to Cahalane, 15 to Regan, 35 to Conlon, and 10 to McNichol, making a total of 175 rifles purchased by

the defendants and the co-conspirators from Montgomery Loan.

The Government proved that 378 weapons were purchased by the defendants and the co-conspirators. Of this total, 26 were purchased by Byrne, 119 by Cahalane, 175 by Conlon, 10 by McNichol and 48 by Regan.

The Government brought into the courtroom and introduced into evidence 137 weapons. (N. T. 6-121; 9-217). In addition, the Government introduced photographs of 27 weapons (N. T. 9-88), and produced evidence as to 16 additional weapons. (N. T. 9-81). Of these 180 weapons, 78 were British Enfield rifles, 91 were Armalite rifles, 7 were Plainfield Machine Works M-1 rifles and 4 were M-1903 rifles.

Victor Beavis, a principal officer of the Firearms Section of the Department of Industrial and Forensic Science located in Belfast, Northern Ireland, testified that the Royal Ulster Constabulary and the Royal Military Police send weapons to the Firearms Section which stores the weapons, examines them, and gives testimony in Court about them. (N. T. 6-81; 6-110). Beavis testified that all weapons are accompanied by a form which sets forth the serial number, caliber and type of weapon. (N. T. 6-86). These forms are examined by someone in the Department to insure that the information on the form corresponds with the information on the weapon.

Beavis testified that the serial numbers of the 137 guns introduced in evidence matched the serial numbers on the forms of the Department of Industrial and Forensic Science, and that all of the guns in evidence had been turned over to his Department by the Royal Irish Constabulary and the Royal Military Police in Northern Ireland. (N. T. 6-89; 9-27–28; 9-40). He testified that all of these weapons had been received by his Department between

May 1972 and May 1975. (N. T. 9-30–38). Beavis also testified that the Department of Industrial and Forensic Science had received 27 additional guns for inspection which could not leave the country because they were the subject of court proceedings in Northern Ireland. (N. T. 9-90). At Beavis' instruction, a photographer in the Department of Industrial and Forensic Science took pictures of these weapons. (N. T. 9-90). These photographs were identified and introduced into evidence. (N. T. 9-94). Beavis also testified that the forms of the Department of Industrial and Forensic Science showed that sixteen additional guns were recovered and were disposed of through normal channels. (N. T. 9-81; 9-84).

Raymond Hubbert, an ATF agent, testified that on the basis of the weapons' purchase records in evidence and Mr. Beavis' testimony, he prepared summary charts of the weapons purchased and the weapons received in Northern Ireland. (N. T. 14-164). One chart showed that all of the weapons that were in evidence or had been identified by Mr. Beavis were purchased by a defendant or co-conspirator and recovered in Northern Ireland. (N. T. 14-164). This chart showed that of the total 180 weapons that had been received by authorities in Northern Ireland and turned over to the Department of Industrial and Forensic Science, 11 had been purchased by defendant Byrne, 40 had been purchased by defendant Cahalane, 90 by co-conspirator Conlon, 8 by McNichol and 31 by Regan. Another chart showed that certain weapons that were purchased together were received together by Northern Irish authorities. (N. T. 14-170).

John Casey testified that he had been a member and officer of the Irish Northern Aid Committee from 1970 to 1972. (N. T. 12-63–64). He stated that when he joined the organization he understood its purpose to be the rais-

ing of funds to help the homeless people of Northern Ireland, but that in 1971, Martin Lyons, the leader of the Irish Northern Aid Committee, told him that the policy was being changed, and that the money could be used by the people in Northern Ireland to purchase weapons. (N. T. 12-66–67). Casey testified that the purpose of the Irish Northern Aid Committee was the moving of guns and ammunition bound for Ireland, (N. T. 12-89) and testified to several occasions when he participated in crating guns and picking up guns for the Irish Northern Aid Committee. (N. T. 12-98). He testified that guns were always referred to as "clothing" because they didn't want to discuss the movement of guns in the open. (N. T. 12-111–112). Martin Lyons, who directed the pickup of guns (N. T. 12-112), discussed with Casey the purchase of guns in Connecticut in 1971 and the checking out of gun shops in upstate New York in 1972 (N. T. 12-105) with Frank Grady, the Chairman of an Irish Northern Aid Committee chapter. (N. T. 12-67). Lyons once told Casey that the "boys in Philly really came through for us" (N. T. 12-106), and once went to Philadelphia for a weekend with Grady. (N. T. 12-107). Lyons told Casey not to discuss anything over the phone because the Irish Northern Aid Committee phones were being tapped. (N. T. 12-102). Casey identified Cornelius Buckley, a friend of Lyons, as being present at the Irish Northern Aid Committee headquarters in the Bronx. (N. T. 12-67). Casey testified that Grady told him that Martin Lyons dressed up as a priest to get two trunks past customs and on board a ship bound for Ireland. (N. T. 12-91).

Michael Plunkett, an ATF agent, testified that he had contact in an undercover capacity with Eugene Marley, an unindicted co-conspirator, in Syracuse, New York in the spring of 1972. (N. T. 10-11–12). Marley said he was

active with the provisional wing of the IRA and that he was engaged in obtaining automatic weapons, explosives, rocket launchers and rockets for the IRA. (N. T. 10-12). He said that he was connected with an IRA group in Philadelphia (N. T. 10-13), that the organization was big in Philadelphia (N. T. 10-29), and that he would have to get the okay for the money from Philadelphia. (N. T. 10-29). Marley said that he made phone calls to his Philadelphia contact on Sundays. (N. T. 10-30). His telephone toll records show a pattern of Sunday calls to a Mr. Corry, to whose home Cahalane was traced by surveillance. (N. T. 14-134–135). Marley arranged to have a truck available to pick up some weapons which were to be delivered on June 19, 1972 near Binghamton, New York, after which they would be taken to the Bronx in New York City. (N. T. 10-23–24). As a result of surveillance, Richard Weller and Robert Hutt, ATF agents, observed Marley entering a hotel in Kirkwood, New York on June 20, 1972. (N. T. 10-51–53). He met with two men who arrived in a van truck. (N. T. 10-52–54). The men in the van were later stopped by Paul Starck, a New York state policeman, in response to a request by ATF agent Noel Haera, who participated in surveillance of the meeting in the motel. (N. T. 10-110–111). Starck testified that the driver of the van produced a New York State driver's license in the name of Cornelius Buckley and a registration showing that the vehicle was owned by Martin Lyons. (N. T. 10-74). The other man in the van produced a driver's license in the name of Martin Lyons. (N. T. 10-74).

William Kavanaugh, an ATF agent acting in an undercover capacity representing that he had weapons for sale, testified that on July 8, 1972, he was at a meeting in the Bronx, New York City, attended by Ted Carroll, Martin Lyons, and Cornelius Buckley. (N. T. 12-32). Carroll had previously identified himself as Colonel Carroll of the

IRA (N. T. 12-24) and Lyons and Buckley said they were members of the IRA. (N. T. 12-44). At that meeting they discussed with Kavanaugh the purchase from him of antitank rockets, grenade launchers, grenades and machine guns which they said were needed to knock out the armored cars used by the British. (N. T. 12-33–34). Agent Kavanaugh was shown the cash needed for the purchase, which was $11,300. (N. T. 12-37). Lyons said that the weapons would be crated as plumbing material for shipment to Northern Ireland. (N. T. 12-39).

Thomas Clark, an ATF agent, testified that he observed Byrne and Cahalane entering Lyons' residence in the Bronx, New York on November 30, 1972 and on January 30, 1973. (N. T. 14-142–152).

James Kelly, an ATF agent, testified that he observed Byrne and Cahalane leaving Cahalane's residence on January 27, 1972 at 8:30 p.m. and that Byrne removed several rifles and a canister used by the military to carry ammunition from the trunk of his car and put it in Cahalane's car. (N. T. 13-115–118). Kelly also testified that on March 2, 1973, he observed Cahalane and Byrne at the Palaces' residence and place of business at 8:00 p.m. loading boxes of weapons into Cahalane's car. (N. T. 13-119–126).

Thomas Lydon, an ATF agent, testified that on February 23, 1973, he saw cardboard cartons being unloaded from a car with New York license plates and taken inside Forney's Gun Shop in Penndel, Pennsylvania. (N. T. 14-90–92). On February 26, 1973, he observed Donald Palace, Marjorie Palace's husband, put the same boxes into Palace's car. (N. T. 14-94). On March 2, 1973, he saw the same cartons being loaded at Palace's residence by Byrne and Cahalane into Cahalane's car. (N. T. 14-96–97). On March 24, 1973, Agent Lydon observed, on the rear of a truck used by Cahalane in his business, cartons similar in appearance. (N. T. 14-103).

The defendants contend that the evidence, which we have summarized above, is insufficient for the jury to have found that there was an agreement of which they had knowledge and claim that the evidence established no more than "knowledge shadowy dealings", which is insufficient to infer that Byrne and Cahalane were part of the conspiracy. *United States v. Kates, supra,* 508 F. 2d at 312. However, we find that there was sufficient evidence from which the jury could reasonably find the existence of an agreement to export weapons without a license and the defendants' knowledge and participation in the conspiracy.

Sufficiency of Evidence as to Substantive Counts.

The defendants also claim that the evidence is insufficient to support their conviction on the substantive counts of aiding and abetting the exportation of firearms without a license. As stated before, it was the Government's theory that even though it produced no evidence concerning the manner of export,[6] the evidence is sufficient for the jury to find beyond a reasonable doubt that the firearms were exported without a license and that the defendants knowingly aided and abetted the illegal transportation.

In order to convict a defendant of aiding and abetting the commission of a crime, the Government must prove two essential elements. First, that the substantive crime has been committed, *United States v. Tornabene,* 222 F. 2d 875, 878 (3d Cir. 1955), and, second, that the defendant charged with aiding and abetting had knowledge of the commission of the substantive offense and acted with

6. Count 4 of the indictment, for example, charges that "in a manner to the Grand Jury unknown", Cahalane "knowingly, willfully and unlawfully transported and caused to be transported" the firearms.

the intent to facilitate the commission of such offense. *United States v. Cades,* 495 F. 2d 1166, 1167-1168 (3d Cir. 1974); *United States v. Docherty,* 468 F. 2d 989, 992 (2d Cir. 1972). See *United States v. Bryan,* 483 F. 2d 88 (3d Cir. 1973); *United States v. Provenzano,* 334 F. 2d 678 (3d Cir.), *cert. denied* 379 U. S. 947, 85 S. Ct. 440, 13 L. Ed. 2d 544 (1964). The defendants contend that the Government produced insufficient evidence to prove either of these two essential elements.

Although we have already found that there is sufficient evidence in the record for the jury to reasonably find Byrne and Cahalane guilty of the conspiracy count, we now find that even when looking at the evidence in a light most favorable to the Government, the Government failed to produce evidence sufficient for the jury to find beyond a reasonable doubt that the offense of exporting firearms without a license was committed by anyone. As heretofore discussed, an essential element of the crime of aiding and abetting is proof that the offense was committed by someone.

As stated by the Supreme Court in *Pinkerton v. United States,* 328 U. S. 640, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489 (1946):

> It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. . . . The agreement to do an unlawful act is even then distinct from the doing of the act. [Footnotes omitted].

Our Third Circuit in *United States v. Papas,* 445 F. 2d 1194 (3d Cir. 1971) said:

> *Pinkerton v. United States* makes clear that the crime of conspiracy is separate and distinct from a related substantive crime. (Citations omitted).

In *United States v. Sall,* 116 F. 2d 745 (3d Cir. 1940), which held that although the evidence in the case was sufficient to support a conspiracy conviction, it was not sufficient to support a conviction on the substantive count, Judge Maris pointed out:

> This is for the reason that the gist of the crime charged by the conspiracy count was his agreement or combination with the other defendants to effect the unlawful object of the conspiracy and not the commission of the overt acts which followed.
>
> In the present case the circumstantial evidence which we have recited was undoubtedly sufficient to support the inference drawn by the jury that the defendant Sall was a member of the conspiracy . . . . We do not think, however, that the government's evidence was sufficient to support the inference that the defendant Sall knowingly and with criminal intent participated . . . (in the substantive offense). The evidence does not exclude the possible inference that . . . (the substantive offense was committed) by others without the knowledge of the defendant Sall. 116 F. 2d at 747-748.

We have no question that the Government produced ample proof that Byrne purchased the 11 M-1903 rifles described in Count 5 of the indictment from Montgomery Loan Company on January 14, 1972 and that the one rifle he is charged in Count 5 with exporting without a license was turned over to the Department of Industrial and Forensic Science by either the Royal Ulster Constabulary or the Royal Military Police in Belfast, Northern Ireland on April 29, 1974. However, the record is devoid of any evidence as to how or who transported that weapon to Northern Ireland. Likewise, the Government produced

ample proof that on March 21, 1972, Byrne purchased 10 Armalite AR-180 auto-loading rifles specified in Count 13 of the indictment from Montgomery Loan Company and that the 7 rifles he is charged in Count 13 with exporting to Northern Ireland without a license were turned over to the Department of Industrial and Forensic Science between April 3, 1973 and October 18, 1974. However, as to those 7 weapons, no evidence was produced concerning the manner or by whom they were exported.

The same is true of the Counts charging Cahalane with transporting weapons to Northern Ireland without a license. In Count 4 he is charged with purchasing 5 Armalite AR-180 auto-loading rifles and 4 M-1903 rifles on January 14, 1972. The Government proved that the weapons were purchased by him from Montgomery Loan Company and that 3 of the Armalite rifles and 3 of the M-1903 rifles that the defendant is charged with transporting without a license were turned over to the Department of Industrial and Forensic Science between February 22, 1973 and January 21, 1975. However, the Government produced no evidence as to how or by whom they were exported.

In Count 9 Cahalane is charged with purchasing 15 Armalite AR-180 auto loading rifles and transporting 14 of them without a license. The Government proved that all of the guns were purchased on January 28, 1972 from Montgomery Loan Company and that 14 were turned over to the Department of Industrial and Forensic Science between May 17, 1972 and June 16, 1975, but offered no evidence as to how or by whom the weapons were transported.

In Count 11 Cahalane is charged with purchasing 15 Armalite AR-180 auto-loading rifles and with transporting 13 of them without a license. The Government proved

that all 15 rifles were purchased on March 10, 1972 from Montgomery Loan Company. The Government adduced no proof, however, concerning the manner or by whom they were exported.

In Count 15 the indictment charge that Cahalane purchased 5 Armalite AR-180 auto-loading rifles and transported 4 of them without a license. Even though the Government proved that all the weapons were purchased on March 21, 1972 from Montgomery Loan Company and that 4 were received by the Department of Industrial and Forensic Science between September 3, 1973 and January 23, 1975, it did not offer any evidence as to how or by whom the weapons were transported.

Count 16 charges Cahalane with purchasing 25 Armalite AR-180 auto-loading rifles and transporting, without a license, 5 of those weapons. Proof at trial established that the weapons were purchased on April 5, 1972 from Montgomery Loan Company and came into the possession of the Department of Industrial and Forensic Science between April 3, 1973 and April 9, 1974, but there was no evidence as to the manner and by whom they were exported.

The Government's proof of exporting without a license was limited to the introduction of a document from the Department of State showing that for the period from January 1, 1969 to March 3, 1976, no record existed concerning the issuance of any export license to Byrne, Cahalane, Conlon, McNichol, Regan or Duffy. However, the record in this trial is completely devoid of any testimony by the Government showing that no license or licenses were issued in connection with the export of any of the firearms described in the indictment.

It is the contention of the Government that since the evidence shows that the weapons were purchased by the

defendants or the co-conspirators; that the weapons came into the hands of the authorities in Northern Ireland; and that there were overt and clandestine meetings and discussions concerning the lawful and unlawful purchase of weapons, the jury could reasonably infer that the weapons described in the indictment were exported without a license. The Government specifically points to the testimony of Reh and Nigro. Nigro testified that Duffy said they were running into problems with customs and that Scotland Yard was cooperating with the FBI. However, to sustain its burden, the Government was required to prove either by circumstantial or direct evidence that the firearms described in the indictment were exported without a license. This the Government failed to do. The Government failed to produce one scintilla of evidence concerning the illegal exportation of the weapons described in the indictment. This total lack of evidence we find to be fatal to the Government's case, as to the substantive counts. As we have heretofore pointed out, however, the evidence is sufficient for the jury to find the defendants Byrne and Cahalane guilty on the conspiracy count in that the evidence is amply sufficient for the jury to find beyond a reasonable doubt that the defendants conspired to export firearms without a license. To support a conspiracy conviction, the Government must show an agreement and specific intent to achieve an unlawful goal. The evidence in this case does establish the existence of a conspiracy to export guns without a license, although it fails to show how or by whom the specific guns described in the indictment were exported. It is well-established that in order to find one guilty of conspiracy, it is not necessary for the Government to show that the conspiracy was successful; as a matter of fact, the proof may show that the conspiracy failed. However, such is not the case for aiding and abetting. To support an aiding and abetting charge the Government must produce evidence from which the jury can find beyond a reasonable doubt that someone committed the crime, i.e., that in this case, someone exported without a license the weapons described in the indictment.

Although "the jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference", *Tot v. United States,* 319 U. S. 463, 63 S. Ct. 1241, 1244, 87 L. Ed. 1519 (1943),[8] it is well-settled that the Court cannot permit the jury to rely on conjecture or speculation in arriving at its verdict. *United States v. Heithaus,* 391 F. 2d 810 (3d Cir. 1968); *United States v. Cockerill,* 366 F. Supp. 856 (S. D. Ill. 1973). We believe that the jury was required to speculate as to whether the weapons described in the indictment were, in fact, exported by anyone without a license and that the evidence produced at trial invites such conjecture.

The Government also contends that since it proved "specific acts of the defendants to aid and abet an export and an inescapable inference of intent to export illegally, that none of the defendants had a license to export, and that the weapons in question were in fact exported, the burden of proceeding shifted to the defendants to advance a defense that someone else possessed the necessary license as that information, if a fact, was peculiarly within their knowledge."[9]

We again point out that these defendants were charged with aiding and abetting in connection with the export of guns without a license. As we have heretofore stated, the burden was on the Government to prove that someone committed the crime of exporting without a li-

8. *See United States v. Strickland,* 509 F. 2d 273 (5th Cir. 1975); *United States v. Pichany,* 490 F. 2d 1073, 1078-79 (7th Cir. 1973).

9. Letter of Government dated July 20, 1976.

cense. The Government's argument that the burden of proceeding shifted to defendants to advance a defense that someone else possessed a license is in no way supported by the cases cited by the Government and this Court knows of no theory of criminal law which would relieve the Government from the burden of proving that the guns were exported without a license.

In support of its contention, the Government appears to place reliance on *United States v. Fleischman,* 339 U. S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950); *Morrison v. People of California,* 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934); and *Rossi v. United States,* 289 U. S. 89, 53 S. Ct. 532, 77 L. Ed. 1051 (1933). Although the more recent decisions of our Supreme Court appear, for the most part, to have discredited the theory expressed by these cases that the burden in a criminal case shifts to the defendant as to facts which could more conveniently be proved by a defendant,[10] there is no factual basis in this

10. In suggesting that information concerning possession of a license by someone other than the defendants is a fact peculiarly within the knowledge of the defendants and therefore justifies shifting the burden to the defendants, the Government appears to rely on the "convenience test". In *Leary v. United States,* 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), the Supreme Court reviewed its holding in *Tot v. United States,* 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), in which it stated that a statutory presumption is valid when there is a rational connection between the fact proved and the fact presumed. The Supreme Court in *Leary* cited *Morrison v. California,* 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934) an example of the "convenience test" and said:

> The Tot Court reduced to the status of a "corollary" another test which had some support in prior decisions: whether it was more convenient for the defendant or for the Government to supply proof of the ultimate fact which the presumption permitted to be inferred. [Footnotes omitted]. 89 S. Ct. at 1547.

Later in this opinion, the Supreme Court in *Leary* said:

> However, we consider that this approach, which closely resembles the test of comparative convenience in the production of evidence [citing Morrison] was implicitly abandoned in

case for claiming that it would have been more "convenient" for the defendants to prove that someone possessed a license to export the guns in question. Not only would such knowledge be more readily available to the United States Government, i.e., that no one had a license to ship these guns, but the cases make it abundantly clear that the Government had the burden of proving that the guns were exported without a license. It is the State Department which issues licenses for exporting weapons. In this case the only evidence presented by the Government was that the three defendants on trial, the two defendants who were fugitives, and one of the two unindicted co-conspirators named in the indictment did not have a license. We take no issue with the rule cited by the Government that the burden is on the defendants to establish that they come within an "exception" to the statute that requires a license to export the weapons in question, *McKelvey v. United States,* 260 U. S. 353, 43 S. Ct. 132, 67 L. Ed. 301

10. (Cont'd.)

> Tot . . . . [W]hile recognizing (in Tot) that "the defendants . . . knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce", 319 U. S., at 469, 63 S. Ct., at 1246 [87 L. Ed., at 1525], the Court held that because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant. 89 S. Ct. at 1552.

The Government also relies on the following Statement in Underhill, Criminal Evidence, Sixth Edition (1973), ¶ 53, p. 115:

> But if a fact is peculiarly within the knowledge of the accused, as his own age when he pleads nonage as to a defense or that he has a license to carry on an otherwise prohibited business or do an otherwise forbidden act, the burden of proof generally rests on him.

The most recent case cited in Underhill to support this statement is *Communist Party of United States v. United States,* 118 U. S. App. D. C. 61, 331 F. 2d 807, 814 (1963), cert. denied, 377 U. S. 968, 84 S. Ct. 1646, 12 L. Ed. 2d 737 (1964). However, *Communist Party* relies on the now discredited case of *Morrison v. California,* 291 U. S. 82, 54 S. Ct. 281, 284, 78 L. Ed. 664 (1934).

(1922); *United States v. Rosenberg,* 515 F. 2d 190, 199 (9th Cir. 1975), *cert. denied* 423 U. S. 1031, 96 S. Ct. 562, 46 L. Ed. 2d 404; *United States v. Chodor,* 479 F. 2d 661, 663 (1st Cir.), *cert. denied,* 414 U. S. 912, 94 S. Ct. 254, 38 L. Ed. 2d 151 (1973). We emphasize, however, that in this case we are not dealing with any "exception" or "exemption" to the statute. It was the Government's burden to prove, beyond a reasonable doubt, all of the elements of the crime of aiding and abetting the exportation of particular weapons, which, in this case, required proof that someone committed the substantive offense of exporting the guns described in the indictment without a license.[11]

11. In *Mullaney v. Wilbur,* 421 U. S. 684, 95 S. Ct. 1881, 1891, 44 L. Ed. 2d 508 (1975), the Supreme Court reaffirmed its holding in *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970) that the due process clause of the Fourteenth Amendment requires the Government to prove beyond a reasonable doubt every fact necessary to constitute the crime the defendant is charged with committing. *Mullaney* explains that although in a criminal case the Government generally bears both the production burden and the persuasion burden, in some *particular* instances the Government is aided by a presumption or a permissible inference which must meet exacting standards of due process. In each of the cases where the production burden is shifted, the ultimate burden of persuasion by proof beyond a reasonable doubt remains on the prosecution. 95 S. Ct. at 1891-1892, n.'s 31, 32. However, *Mullaney* establishes no general rule permitting the production burden to shift; only specific instances of procedural devices set forth in statutory form or well recognized by historical custom are recognized. In striking down a Maine statute which required a defendant in a murder case to prove by a preponderance of the evidence that he acted in the heat of passion in order to reduce the homicide from murder to manslaughter, the Supreme Court stated:

> It has been suggested that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential. (Citations omitted). 95 S. Ct. at 1891.

Defendants' Other Contentions.

The defendants have alleged a great number of other errors. Many of these assignments of error were raised pre-trial and were ruled upon after oral argument and presentation of briefs. We will, however, briefly review the alleged errors, inasmuch as the record contains the arguments of both sides as well as the reasons for the Court's rulings.

Motion in Arrest of Judgment.

In support of their motion in arrest of judgment, the defendants contend that the Counts charging them with exporting firearms without a license (Counts 4, 5, 9, 11, 13, 15, 16) do not charge an offense because the indictment fails to allege that the defendants were engaged "in the business of exporting" firearms without registration which they claim is the only offense cognizable under 22 U. S. C. § 1934. This same argument was rejected in *Samora v. United States,* 406 F. 2d 1095 (5th Cir. 1969). There, the defendant, charged with a violation of this statute when intercepted at the United States-Mexico border with handguns secreted in his car, claimed that one isolated act would not bring him within this statute. The Court in *Samora* said that even though 22 U. S. C. § 1934(b), *supra,* requires "every person who engages in the business of manufacturing, exporting, or importing any arms, ammunition, or implements of war . . . designated by the President under subsection (a) of this section" to register, subsection (a) of § 1934 authorizes the President to "control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition, and implements of war", and subsection (c) speaks in terms of "any person" who violates any rule or regulation issued under the section. 406 F. 2d

at 1097. 22 C. F. R. Section 127.01, promulgated pursuant to § 1934, provides that it shall be unlawful for "any person" to export from the United States any article on the United States Munitions List without first having obtained a license. Thus, *Samora* holds that neither the regulation requiring a license to export the items listed by the President nor the regulation providing for application is limited to the export by one "engaged in the business." 406 F. 2d at 1097. We so conclude.

The defendants also contend that the substantive counts and the conspiracy count (Count 1) do not charge an offense because the indictment fails to allege the manner in which the weapons were transported from the United States to Northern Ireland. This, they allege, is an essential element of the offense. It is well established that the function of an indictment is to apprise the defendant of the charge of which he is accused and to provide protection against reprosecution should an acquittal result. *United States v. Goldstein*, 502 F. 2d 526, 529 (3d Cir. 1974); *United States v. Schartner*, 426 F. 2d 470, 476 (3d Cir. 1970). An indictment is sufficient if it contains a plain, concise, and definite written statement of the essential facts constituting the offense and states all the essential elements of the offense charged. *United States v. Barbato*, 471 F. 2d 918, 921 (1st Cir. 1973). As to the necessity of alleging the manner of export, 22 C. F. R. Section 121.18, promulgated pursuant to § 1934, states:

> For the purposes of this subchapter the term "export" means the sending or taking out of the United States in any manner of any article, equipment, or technical data on the United States Munitions List except as may be otherwise expressly provided in a particular context. (Emphasis added).

The manner of the export is not an essential element of the crime. We hold that the indictment sets forth a sufficient description of the facts and elements of the crime.[12]

Motion for a New Trial—Pre-Trial Rulings.

The defendants argue that the Court erred in failing to sever the Counts charging them with acting as an agent of a foreign government without prior notification to the Secretary of State in violation of 18 U. S. C. § 951 [13] and 18 U. S. C. § 11 [14] from the rest of the Counts, and that the Court erred in declining to rule as a matter of law prior to trial on whether the IRA was "a Body of Insurgents" as charged in the indictment and provided in 18 U. S. C. § 11. The defendants claim that the Court's pre-trial ruling prejudiced them in that it permitted the Government to introduce inflammatory evidence which was not relevant to the charges in the indictment. Prior to trial the Court ruled that whether the IRA was a body of insurgents was a question of fact which should be decided by the jury and not by the Court. At the close of the Government's case, the Court granted the defendant's motion for judgment of acquittal in connection with the foreign agent Counts. After granting the motion, the Court instructed the jury

12. *See Etheridge v. United States*, 380 F. 2d 804, 809 (5th Cir. 1967) in which a similar claim was raised and rejected in connection with an indictment similarly drafted as to these Counts.

13. 18 U. S. C. § 951 provides as follows:

> Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

14. 18 U. S. C. § 11 provides as follows:

> The term "foreign government", as used in this title, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

to disregard any evidence concerning the question of whether the IRA was a body of insurgents. (N. T. 17-25). Furthermore, Laris Hytle, a State Department consular officer, was the only witness who gave testimony concerning the situation in Northern Ireland. (N. T. 7-17–111).[15] His testimony was relevant to the issue and was neither inflammatory nor prejudicial.

The defendants argue that the Court erred in failing to exclude Jack Nigro's telephone transcript of October 3, 1972 on the grounds that the best evidence, the tape recording of the conversation, was destroyed by Nigro while he was employed as an agent of the Federal government. A pretrial hearing was held on May 20, 1976, at which time Nigro was subject to direct and cross-examination. At the conclusion of the hearing, the Court found that Nigro had not been acting as an agent of the Federal government and at trial ruled that the telephone transcript should not be excluded [16] since the tape had not been destroyed in bad faith and, if Nigro was believed by the jury, the transcript was accurate. (N. T. 11-136–139). At trial, Nigro testified as to the events surrounding the transcript (N. T. 11-144–148), and defense counsel searchingly cross-examined Nigro on every detail concerning it. (N. T. 11-182–252). We have reviewed the record and find no prejudice to the defendants in the Court's having admitted it in evidence.

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15. Professor John Moore, a professor of International Law at the University of Virginia School of Law, testified as an expert in the field of international law. (N. T. 7-127–193). Jay Mallin, a journalist, testified as an expert in the area of unconventional warfare. (N. T. 11-5–69). Neither witness gave any testimony directly concerning any event in Northern Ireland.

16. The defendants rely on *United States v. Harrison*, 173 U. S. App. D. C. 260, 524 F. 2d 421 (1975) and *United States v. Bryant*, 142 U. S. App. D. C. 132, 439 F. 2d 642 (1971). Both of these cases discuss the responsibility to maintain materials on the part of a government "agent".

The defendants also contend that the Court erred in not granting a pre-trial hearing to determine whether there had been any taint from alleged unlawful electronic surveillance. In response to defendants' pre-trial motion seeking an order disclosing information relevant to electronic surveillance, pursuant to 18 U. S. C. § 3504(a)(1), the Government filed an affidavit by David H. Hopkins, an attorney in the Criminal Division of the Department of Justice, who was assigned to prepare and try this case. This affidavit stated that he had turned over to defense counsel transcripts of two electronic overhearings of persons who might have been defendants. It further stated that no evidence in the case was the primary product of an unlawful act. On May 6, 1976, the Court denied the defendants' motion for a hearing, conditioned on the Government's agreement to set forth a more comprehensive affidavit showing the Federal agencies that were contacted by the Government. On May 11, 1976, David Hopkins complied with the Court's order by filing a supplemental affidavit setting forth the Federal agencies that were contacted. In light of the allegations of the defendants and the affidavits of the government, the failure to hold a hearing is not error. *See United States v. D'Andrea*, 495 F. 2d 1170 (3d Cir. 1974).

Evidentiary Errors.

The defendants claim that the Court erred in permitting the introduction of foreign agents registration documents which were allegedly obtained in violation of defendants' Fifth Amendment rights. The Government introduced short form registration forms filed with the Department of Justice by the three defendants on trial to show motive, intent and means by which the conspiracy was effected, inasmuch as the documents evidenced that the defendants were officers of the Irish Northern Aid

Committee. (N. T. 13-210–211, 14-33). The defendants objected, claiming that the documents violated their Fifth Amendment privilege of self-incrimination.[17] Their argument is as follows: After extensive communications with the Justice Department concerning the status of the Irish Northern Aid Committee in 1972 and 1973, the defendants, as officers of the Irish Northern Aid Committee, filed registration statements pursuant to the Foreign Agents Registration Act of 1938, 22 U. S. C. § 611 et seq., as amended. It is the defendants' contention that at the same time the Government was investigating the Irish Northern Aid Committee to discover whether it had violated 18 U. S. C. § 951 by not registering with the Department of State. Therefore, conclude the defendants, the Foreign Agents Registration Act violates their Fifth Amendment rights. After extensive oral argument and testimony out of the presence of the jury, the Court noted that the Foreign Agents Registration Act had been subject to attack on Constitutional grounds and upheld in *Attorney General v. Irish Northern Aid Committee*, 346 F. Supp. 1384 (S. D. N.Y. 1972), *aff'd* 465 F. 2d 1405, *cert. denied* 409 U. S. 1080, 93 S. Ct. 679, 34 L. Ed. 2d 669 (N. T. 14-35). In that case, the Court found that:

> It cannot be seriously argued that the sole or dominating purpose of the Act is to compel criminals to keep incriminating records to be used to convict the record-keepers in subsequent criminal trials. Its purpose is to meet the Government's need for records necessary to enforce its national defense and foreign policies.

17. At trial the defendants cited *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and appeared to abandon their original reliance on *Leary v. United States*, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); *Marchetti v. United States*, 390 U. S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1967); and *Haynes v. United States*, 390 U. S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968).

> And so, here disclosure of defendant's activities bears a substantial relation to a legitimate interest which is asserted by the Government to justify the disclosure. The governmental interest may fairly be said to outweigh any possible infringement of the First Amendment rights of the defendant's members or contributors. 346 F. Supp. at 1391.

In *Attorney General*, the Court distinguished *Albertson v. Subversive Activities Control Board*, 382 U. S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965) on the ground that the purpose of the Foreign Agents Registration Act is not to compel criminals to keep incriminating records as was found to be the case with the Act in question in *Albertson*. As Justice Brennan, in his concurring opinion in *Fisher v. United States*, 425 U. S. 391, 96 S. Ct. 1569, 1587, 48 L. Ed. 2d 39 (1976), points out: "*Couch v. United States*, 409 U. S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973) expressly held that the Fifth Amendment protected against the compelled production of testimonial evidence only if the individual resisting production had a reasonable expectation of privacy with respect to the evidence." (Citations omitted). No reasonable expectation of privacy could attach to the forms filled by the defendants pursuant to the Foreign Agents Registration Act. We find no error in the Court's ruling.

The defendants also argue that the Court erred in permitting all of the weapons received by authorities in Northern Ireland and turned over to the Department of Industrial and Forensic Science for inspection to remain in the courtroom throughout the trial inasmuch as only 51 of the 137 weapons were attributable to the defendants on trial. However, the weapons in the courtroom were all purchased by the defendants or their co-conspirators and introduced in evidence. (N. T. 6-21–22; 9-217).

The weapons themselves were the central evidence in the case; in fact, several of the government's witnesses required the weapons for the presentation of their testimony. (N. T. 6-63; 6-89–91; 6-121–142; 6-151–154). Since the weapons were relevant and material to the case, any possible prejudicial effect of these items (and the defendants have not alleged any prejudice) clearly was outweighed by their probative value. *United States v. Bamberger*, 456 F. 2d 1119 (3d Cir. 1972), *cert. denied*, 413 U. S. 919, 93 S. Ct. 3067, 37 L. Ed. 2d 1046 (1973); *United States v. Farries*, 328 F. Supp. 1034 (M. D. Pa. 1971). The presence of the weapons in Court was a determination within the discretion of the trial judge and we find no abuse of discretion.[18] The defendants also claim error because three of the weapons were present in the jury room. The fact that the jury, during its deliberation, requested to see one of each type of weapon can hardly be said to have any prejudicial effect.

The defendants contend that the Court unduly restricted the cross-examination of Jack Nigro by prohibiting the defense from proving on cross-examination that Nigro had issued some checks which bounced. On the basis of Rule 608(b) of the Federal Rules of Evidence, the Court excluded the evidence. This Rule states as follows:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.[19]

18. In *United States v. Johnson*, 401 F. 2d 746, 747-48 (2d Cir. 1968), the Court said:

> [t]he evidence was relevant; it can hardly be said in a case where a gun is used in a hold-up that the gun . . . is too prejudicial to be considered by the jury.

The Court ruled that since there had been neither an indictment nor a conviction and since the writing of checks which bounce can often occur where no criminal intent is involved, in the exercise of its discretion, it found that the matter was not probative of the witness's truthfulness. (N. T. 11-225).

The defendants also contend that the Court restricted the cross-examination of Nigro by prohibiting the defense from proving on cross-examination that Nigro had worked as an informant while he was under indictment for a firearms offense. The Court ruled that defense counsel could question the witness concerning any agreement which the witness had with the Government in connection with his testifying at the trial. (N. T. 11-212). The defense thoroughly explored Nigro's motives in working with the Government agents; rather than being restricted, defense counsel were permitted wide latitude in their cross-examination.

The defendants claim the Court erred in permitting testimony concerning the activities of Vincent Conlon, Thomas Regan, William McNichol and Colm Frie; the

19. Prior to the adoption of the Federal rules, the case law was well-established that prior criminal acts of a witness which did not result in an indictment and conviction could not be introduced to impeach a witness's credibility. *See, e.g., United States v. Qualls*, 500 F. 2d 1238 (8th Cir.), cert. denied, 419 U. S. 1051, 95 S. Ct. 628, 42 L. Ed. 2d 646 (1974); *United States v. Sposato*, 446 F. 2d 779 (2d Cir. 1971); *United States v. Glasser*, 443 F. 2d 994 (2d Cir.), cert. denied, 404 U. S. 854, 92 S. Ct. 96, 30 L. Ed. 2d 95 (1971).

acts and declarations of the following: Eugene Marley, Ted Carroll, Cornelius Buckley, Martin Lyons, John Grady, John Casey, Marjorie Palace; and the testimony of Casey concerning statements of Martin Lyons and John Grady. The defendants argue that insufficient proof was offered to demonstrate that such acts and declarations were performed pursuant to the conspiracy charged in the indictment as to defendants Byrne and Cahalane. All of those named above were alleged co-conspirators. It is well established that out-of-court statements of a co-conspirator may be admissible against other defendants upon a sufficient showing by independent evidence of a conspiracy among one or more other defendants and the declarant if the statements were in furtherance of the conspiracy. *United States v. Trotter,* 529 F. 2d 806 (3d Cir. 1976). *See United States v. Nixon,* 418 U. S. 683, 94 S. Ct. 3090, 3104, 41 L. Ed. 2d 1039; *United States v. Trowery,* 542 F. 2d 623 (3d Cir. 1976); *United States v. Hopkins,* 518 F. 2d 152 (3d Cir. 1975). In the present case there was a sufficient showing by independent evidence of a conspiracy between the defendants Byrne and Cahalane and the declarant co-conspirators. The trial court properly admitted into evidence against the defendants the declarations of the above mentioned co-conspirators.

Errors in the Court's Charge.

The defendants argue that the Court erred in failing to instruct the jury on multiple conspiracies, pursuant to *Kotteakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), and that the Court should have charged that proof of similar enterprises linked only by a common member is not enough to establish a conspiracy encompassing all parties to all transactions. The defendants contend that the meetings and acts in Syracuse and New York City, which they claim were linked solely by the common activities of Lyons, raised the possibility of the existence of two or three conspiracies rather than one overall conspiracy. We believe there was no need to instruct the jury as to multiple conspiracies. Only one conspiracy was alleged in the indictment and only one was proved at trial, *United States v. Barrera,* 486 F. 2d 333 (2d Cir. 1973), cert. denied, 416 U. S. 940, 94 S. Ct. 1944, 40 L. Ed. 2d 291 (1974). The dealings by the participants in the conspiracy in this case evidenced "a large general scheme, and . . . aid given by some conspirators to others in aid of that scheme." *United States v. Kenny,* 462 F. 2d 1205, 1216 (3d Cir. 1972), *cert. denied,* 409 U. S. 914, 93 S. Ct. 233, 34 L. Ed. 2d 176 (1972), cited in *United States v. Adamo,* 534 F.2d 31 (3d Cir. 1976). Furthermore, the Court stressed in its charge that the Government alleged a single conspiracy and that the Government must show that each defendant was a knowing member of this conspiracy. The possibility of "guilt transference" to which defendants allude was properly minimized by the Court's instruction that in determining whether a particular defendant was a member of the alleged conspiracy, the jury should consider only his acts and statements, for he could not be bound by the acts or declarations of other participants unless it was established that a conspiracy existed and that he was a member of it. *United States v. Salerno,* 485 F. 2d 260, 263 (3d Cir. 1973), cert. denied, 415 U. S. 994, 94 S. Ct. 1596, 39 L. Ed. 2d 891 (1974) and cases cited therein.

The defendants contend that the Court erred in failing to instruct the jury that for any defendant to be convicted of conspiracy he must have known that the weapons were to be exported by a person not having a license.

The Court can find no basis for this allegation of error because the Court instructed the jury that a defendant could not be convicted unless he knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law.[20]

20. The jury, during its deliberation, asked the question:

If an individual, fully aware that the weapons he is buying are ultimately going to end up in Northern Ireland, believes that the weapons will leave the United States in a legal manner is he guilty of a conspiracy to have the weapons leave the country illegally?

And the Court answered:

Now the answer to that is "No," and I want to explain the answer so you will understand, I hope, in your further deliberations.

First of all I am going to point out that in my charge this morning I told you that a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means; so a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of every other member, and that the gist of the offense is a combination or agreement to disobey or disregard the law.

As I said this morning in this case, the unlawful purpose charged in the indictment is the exporting or causing to be exported from the United States to Northern Ireland articles on the United States Munitions List without a license in violation of 22 United States Code, § 1934 and the Code of Federal Regulations, 22-127.01.

Now the Government has the burden to establish beyond a reasonable doubt that the conspiracy alleged in the indictment was willfully formed and again, as I pointed out this morning in my charge, and I am just picking out sections that I think pertain to the answer to your question, and to read that again, the Government has a burden to establish beyond a reasonable doubt the conspiracy alleged in the indictment was willfully formed, and I said to act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done, that is to say, to act or participate with the bad purpose either to disobey or disregard the law.

I also said specific intent, as the term implies, means more than the general intent to commit the act. To establish

The defendants claim error in the Court's failure to instruct the jury that mere membership in the Irish North-

20. (Cont'd.)

specific intent the Government must prove that the defendant knowingly did an act which the law forbids or knowingly failed to do an act which the law requires purposely intending to violate the law.

Now I also pointed out in the charge that an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason, and that the purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason.

Now I just want to further explain, as I did this morning, by saying it is not necessary for a defendant to know the particular law which he is violating. It is not necessary for the Government to show that he read the statute or has an actual familiarity with the rules themselves; but he must intend to do the act itself which the law forbids.

Now I just want to say you recall that I gave you the elements of the conspiracy and in connection with the second element I said the second element required before a defendant may be convicted for the crime of conspiracy is that the defendant willfully became a member of the conspiracy and one may become a member of a conspiracy without full knowledge of all the details of the conspiracy, without knowledge of all the other members of the conspiracy.

On the other hand, a person who has no knowledge of a conspiracy but happens to do an act in a way which furthers the object or purpose of the conspiracy does not thereby become a conspirator and mere association with a conspirator or knowledge of the existence of a conspiracy is insufficient evidence to prove participation in the conspiracy, and the Government must establish beyond a reasonable doubt that the defendant whose case you are considering was aware of the basic purpose and the object of the conspiracy and that he entered in the conspiracy with the specific criminal intent, that is, in this case with a purpose to export from the United States any of those articles listed on the United States Munitions List without obtaining a license from the Department of State.

Just to end up, I want to also point out to you what I said in the charge and again I am just picking out sections of it which I think will help you in understanding my answer "No" that I gave to your question, and that is the summary of the conspiracy, and they are the four essential elements that the Government must prove beyond a reasonable doubt:

ern Aid Committee would not constitute evidence sufficient to convict any defendant of conspiracy. Although the Court has not been able to find a request to so charge, in light of the Court's extensive charge concerning the elements of conspiracy, we find no error.

The defendants further claim error in the Court's declining to marshal the evidence as to each alleged conspirator. We find no error or prejudice to any defendant in the Court's alleged failure to discuss the evidence applicable to each defendant.

The defendants argue that the Court erred in failing to caution the jury that the testimony of Jack Nigro should be examined with care if the jury believed he had attempted to induce another to testify falsely or had attempted to deceive law enforcement officers about material facts in the case. The Judge charged the jury as follows:

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20. (Cont'd.)

First, I said the conspiracy described in the indictment, that is, the exporting or causing to be exported from the United States to Northern Ireland articles on the United States Munitions List without a license, was willfully formed and was existing at or about the time alleged; and

Second, that the particular defendant willfully became a member of the conspiracy; and

Third, that during the pendency of the conspiracy one of the conspirators thereafter committed at least one overt act in furtherance of some object or purpose of the conspiracy; and

Fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy.

To bring it back to the "No" answer, I want to say the Government has the burden to prove beyond a reasonable doubt both an agreement, that is, the agreement speaking of the conspiracy as being an illegal agreement, and a specific intent to achieve some unlawful purpose, unlawful goal; and it must be shown that a person, the defendant that you are considering, had knowledge of the conspiracy's illicit purpose when he performed acts which furthered that illicit purpose.

I think I have answered it as completely as I could.

Information obtained from an informant who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the information obtained from an ordinary witness. You must determine whether the informant's information has been affected by interest, or by prejudice against the defendant.

We find that the jury was sufficiently apprised of the care it should exercise in considering the testimony of the informant. *Government of Virgin Islands v. Hendricks,* 476 F. 2d 776 (3d Cir. 1973); *United States v. Bailey, supra,* 451 F. 2d at 181.

The defendants claim that the Court erred in failing to instruct the jury concerning exemption from the licensing requirement. As previously discussed, the burden is on the defendants to establish that they came within an exception. *McKelvey v. United States,* 260 U. S. 353, 43 S. Ct. 132, 67 L. Ed. 301 (1922); *United States v. Rosenberg,* 515 F. 2d 190, 199 (9th Cir. 1975). Since the defendants offered no evidence concerning a statutory exemption, there was no error in failing to so instruct the jury.

Other Alleged Errors.

The defendants contend that since the Government's proof encompassed conspiratorial meetings and acts in Syracuse, New York and New York City on dates and under circumstances not alleged in the indictment, there was a fatal variance in proof which requires a new trial. It is well established that the Government is not limited in its proof at trial to those overt acts alleged in the in-

dictment. *E.g., United States v. Adamo,* 534 F. 2d at 38, *United States v. Quesada,* 512 F. 2d 1043, 1046 (5th Cir. 1975). Since the defendants allege only that the Government introduced evidence as to additional overt acts, but do not claim that the Government proved none of the overt acts alleged in the indictment, we find no fatal variance in the proof that would prejudice the defendants' substantial rights. 534 F. 2d at 38. Furthermore, the Government did prove the majority of the thirty overt acts alleged in the indictment.

The defendants allege that the Court erred in failing to declare a mistrial because the prosecutor, in his closing to the jury, mentioned death and violence. We find that the closing address of the prosecutor was neither inflammatory nor prejudicial.

The defendants urge that the Court erred in failing to declare a mistrial because the Government withheld material that they claim should have been produced pursuant to *Brady v. Maryland,* 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). During the course of the trial, a question arose as to whether a transcript of a phone conversation that Jack Nigro had with defendant Duffy had been prepared by him or by his secretary, Carol Seminaro, and whether Nigro had requested Seminaro to say that she had typed the transcript. After discussion with counsel, the Court ordered the Government to produce any material in its file concerning Seminaro; the Government represented that it had no such material. (N. T. 12-183; 12-195; 15-31; 15-37; 15-54; 15-57; 15-63). Ms. Seminaro was then called as the Court's witness at which time she testified fully as to her conversations with Nigro and with Government agents. (N. T. 15-23–50). Following her testimony, the defendants moved for a mistrial on the ground that the Government had withheld *Brady* material in connection with her testimony. (N. T. 15-60). The

Court denied the defendants' motion on the basis of its finding in this record that *Brady* material was not withheld. (N. T. 15-67). Furthermore, the Court permitted the defense to recall Nigro for the purpose of determining if he had asked Seminaro to lie about the preparation of the transcript. (N. T. 15-71–73). The defense, however, did not recall Nigro for further cross-examination. (N. T. 15-74). We find no error in the Court's ruling. The *Brady* rule involves discovery, after trial, of information known to the prosecution but unknown to the defense. *United States v. Agurs,* 427 U. S. 97, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976).

In the present case, the defense was aware of all the Government's information during trial. Furthermore, unlike *United States v. Harris,* 498 F. 2d 1164 (3d Cir.), *cert. denied* 419 U. S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974), cited by defendants, there was no undisclosed false testimony by any of the Government's witnesses.

The defendants allege that the Court erred in admitting into evidence firearm purchase records and telephone toll receipts without adequate authentication and chain of custody testimony. We have reviewed the numerous occasions when such records were admitted into evidence and find no error.[21]

The defense alleges that the Government did not comply with a pretrial consent order in that it repeatedly

21. For example, Marie Hallowell, the bookkeeper in charge of records for Montgomery Loan Co., testified that in the ordinary course of business she made all the entries into the federally required firearms forms at the time of their sale. (N. T. 2-67–72). John Rugg, General Manager of Century Arms, Inc., testified that documents reflecting transactions with Palace Firearms were made at the time of the transaction and kept in the regular course of business. (N. T. 2-118–127). Robert Smith, a firearms dealer, testified that the invoices produced at trial were completed contemporaneously with the transaction and kept in the regular course of business. (N. T. 3-11). Marjorie Palace testified that she or

introduced evidence which had not been disclosed to the defense. In this complex case involving a multitude of documents, we find no bad faith on the part of the Government and no prejudice to the defendants.

Motion To Inspect Grand Jury Minutes.

The defendants have moved for permission to inspect the grand jury minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. This motion was made by the defendants on the last day of this protracted trial and is based on the allegation that the Government willfully misused the grand jury process in that no evidence was presented to the grand jury concerning the violation of 18 U. S. C. § 951. (N. T. 17-104–107). Even though the counts charging violation of this statute were dismissed at the close of the Government's case, the defendants allege that they were prejudiced by the Government's bypass of the grand jury procedure because inflammatory evidence concerning terrorism and insurgency which, they claim, was not relevant to the charges on which they were found guilty, was introduced into evidence to support the Government's case under 18 U. S. C. § 951.

Although the defendants have cited cases discussing prosecutorial or judicial amendment of a valid indictment or variance of proof between the allegations of the indict-

21. (Cont'd.)
her secretary, under her supervision, prepared lists of serial numbers of firearms on her invoices of firearms transactions. (N. T. 3-127–131; 3-177–182; 3-187; 3-190) and that some of her records were copied by a secretary under her supervision from the original records that had been "dirtied" in a flood. (N. T. 3-192–245; 4-6–24). Noel Haera, an ATF agent, testified that he had obtained telephone toll records by personally contacting the Bell Telephone Company pursuant to an arrangement with the telephone company for the supply of such records. (N. T. 10-103). Edgar Turner, the official custodian of the Bell Telephone Company, delivered telephone toll records pursuant to subpoena. (N. T. 7-199).

ment and the evidence at trial, the real thrust of their argument is that there was insufficient evidence presented to the grand jury to support a violation of 18 U. S. C. § 951. In *Costello v. United States*, 350 U. S. 359, 76 S. Ct. 406, 408-409, 100 L. Ed. 397 (1956), the Supreme Court said:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. (Footnote omitted).

See also, *United States v. Calandra*, 414 U. S. 338, 94 S. Ct. 613, 618, 38 L. Ed. 2d 561 (1974); *United States v. Basurto*, 497 F. 2d 781 (9th Cir. 1974); *United States v. Kenny*, 462 F. 2d 1205 (3d Cir. 1972), *cert. denied* 409 U. S. 914, 93 S. Ct. 233, 34 L. Ed. 2d 176; *United States v. Rundle*, 383 F. 2d 421 (3d Cir. 1967), *cert. denied* 393 U. S. 863, 89 S. Ct. 144, 21 L. Ed. 2d 131 (1968). Disclosure of grand jury minutes is committed to the discretion of the trial judge. *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959); *United States v. Bertucci*, 333 F. 2d 292 (3d Cir.), cert. denied 379 U. S. 839, 85 S. Ct. 75, 13 L. Ed. 2d 45 (1964). We see no special circumstances which would justify our rejection of this well settled law by permitting the defendants to inspect the grand jury minutes.[22] Such

22. Furthermore, we see no evidence of bad faith on the part of the Government, as alleged by the defendants, in seeking to return an indictment of the counts charging violation of 18 U. S. C. § 951. From the beginning of the trial, the Government expressed confidence that it could prove the counts charging violation of 18 U. S. C. § 951; the Government argued strenuously against defendants' motion for acquittal on those counts.

ruling is particularly applicable in this case where defendants' motion was filed on the last day of trial and after the Court had directed a verdict of acquittal as to the counts alleging a violation of 18 U.S.C. § 951.

Even if we accept defendants' argument, however, they were not prejudiced by any testimony produced by the Government to support the charges pursuant to 18 U. S. C. § 951. Furthermore, Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires defenses and objections based on defects in the indictment, other than that it fails to show jurisdiction in the Court or to charge an offense, to be raised prior to trial. Defendants' motion, made on the last day of trial, was therefore untimely filed. *West v. United States*, 359 F. 2d 50 (8th Cir.), cert. den. 385 U. S. 867, 87 S. Ct. 131, 17 L. Ed. 2d 94 (1966). *See Sewell v. United States*, 406 F. 2d 1289 (8th Cir. 1969); *United States v. Visconti*, 261 F. 2d 215 (2d Cir.), *cert. denied* 359 U. S. 954, 79 S. Ct. 743, 3 L. Ed. 2d 762 (1959); *United States v. Miller*, 246 F. 2d 486 (2d Cir.), *cert. denied* 355 U. S. 905, 78 S. Ct. 332, 2 L. Ed. 2d 261 (1957).

Accordingly, as set forth in the attached Order, the Court, for the above mentioned reasons:

1. Denies the defendants' motion for arrest of judgment;

2. Grants the defendants' motion for judgment of acquittal on Counts 4, 5, 9, 11, 13, 15 and 16;

3. Denies the defendants' motion for judgment of acquittal on Count 1;

4. Denies the defendants' motion for a new trial; and

5. Denies the defendants' motion to inspect the grand jury minutes.

APPENDIX "C".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 76-2461, 76-2473, 76-2511/12.

UNITED STATES OF AMERICA

v.

DANIEL CAHALANE AND NEIL BYRNE,
Appellants in Nos. 76-2461 and 76-2473,
Appellees in Nos. 76-2511/12.

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by DANIEL CAHALANE and NEIL BYRNE in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

JOSEPH F. WEIS, JR.,
Judge.

Dated: September 21, 1977.

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-589

In the Supreme Court of the United States

OCTOBER TERM, 1977

DANIEL CAHALANE AND NEIL BYRNE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-589

DANIEL CAHALANE AND NEIL BYRNE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 560 F. 2d 601 (Pet. App. A). The opinion of the district court is reported at 422 F. Supp. 147 (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1977. A petition for rehearing was denied on September 21, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on October 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is barred from appealing a district court judgment of acquittal entered after a jury has returned a guilty verdict.

2. Whether petitioners' privilege against self-incrimination was violated by the admission of forms showing that they had registered as foreign agents under the Foreign Agents Registration Act.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of conspiracy and aiding and abetting the exportation of arms and ammunition without a license, in violation of 18 U.S.C. 371 and 22 U.S.C. 1934. The district court entered a judgment of acquittal on the substantive counts and sentenced each petitioner to one year's imprisonment on the conspiracy count. The court of appeals affirmed the conspiracy conviction and vacated the judgments of acquittal, remanding the case to the district court for sentencing on the substantive counts (Pet. App. A).

The evidence, which is undisputed, shows that petitioners were officers in the Irish Northern Aid Committee (NORAID) (Pet. App. A, p. A4), an organization formed in this country to provide financial assistance to the Irish Republican Army (Pet. App. B, p. A22). Between 1970 and 1973, petitioners and others purchased approximately 360 weapons and 100,000 rounds of ammunition.[1] About half of these weapons were seized by British authorities in Northern Ireland (Pet. App. A, p. A4).

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[1]One co-defendant was acquitted by the jury and two other named defendants were fugitives at the time of trial.

After the jury had convicted petitioners, the district court entered judgments of acquittal on the aiding and abetting counts because it believed there was no evidence that petitioners were actually involved in the exportation of firearms without a license (Pet. App. B, p. A38). The court of appeals reversed on the ground that while there was no evidence to show who exported the weapons, there was sufficient evidence of overt and clandestine activities by petitioners and admissions by other members of NORAID to permit the jury to draw an inference that they had aided and abetted the illegal exportation of firearms without a license (Pet. App. A, pp. A7-A8).

ARGUMENT

1. Petitioners contend (Pet. 10-12) that the government's appeal of their judgments of acquittal is either barred by the Double Jeopardy Clause or not permitted by 18 U.S.C. 3731. Neither claim is correct.

In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570, this Court reaffirmed the principle that "where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." Since the court of appeals' decision will only require reinstatement of the jury's guilty verdict and not a retrial, the Double Jeopardy Clause does not bar the government's appeal.

The Court in *Martin Linen* also reaffirmed the principle that "unless barred by the Double Jeopardy Clause of the Constitution, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29(c) [of the Fed. R. Crim. P.] are authorized by §3731." 430 U.S. at 568. See also *United States* v. *Wilson*, 420 U.S. 332, 337; *United States* v. *Jenkins*, 420

U.S. 358, 365 ("* * * where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted").

2. Petitioners also contend (Pet. 5-10) that their privilege against self-incrimination was violated when the government introduced certain registration statements indicating that they were officers of NORAID. In 1973, NORAID was ordered to register with the government pursuant to the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.* Subsequently petitioners and other members of NORAID submitted short-form registration statements indicating that they were officers in NORAID and that they collected funds for their principal, the Northern Aid Committee located in Belfast, Ireland. These forms were subsequently introduced at petitioners' trial.

Since petitioners did not assert their privilege against self-incrimination when they filed the forms, they were precluded from doing so when the forms were introduced at trial. *Garner* v. *United States*, 424 U.S. 648; *United States* v. *Kordel*, 397 U.S. 1. As the Court noted in *Garner, supra*, at 654, disclosures made without claiming the privilege are not "compelled" incriminations. Here, NORAID resisted registration under the Foreign Agents Registration Act on First Amendment grounds but made no claim that the information disclosed would violate its members' Fifth Amendment rights. See *Attorney General* v. *Irish Northern Aid Committee*, 346 F. Supp. 1384 (S.D.N.Y.), affirmed, 465 F. 2d 1405 (C.A. 2), certiorari denied, 409 U.S. 1080. Petitioners also did not assert their privilege against self-incrimination when they subsequently completed the forms. If the information submitted by petitioners on the forms concerning their membership and positions in NORAID was in fact privileged from

disclosure under the Fifth Amendment (but cf. *California* v. *Beyers*, 402 U.S. 424), petitioners had the same ability to file the form and assert the privilege with respect to that information as the taxpayer had in *Garner* with respect to his occupation as a gambler; and if their assertion of the privilege were well founded, it would have provided them with a defense to prosecution under 22 U.S.C. 618 for not complying fully with the provisions of the Foreign Agents Registration Act. See *Garner, supra,* 424 U.S. at 662-664. Accordingly, petitioners have not been denied a "free choice to admit, to deny, or to refuse to answer" (*Lisenba* v. *California,* 314 U.S. 219, 241; *Garner, supra,* 424 U.S. at 657). Since they failed to claim the privilege against self-incrimination, their disclosures cannot be regarded as having been "compelled" within the meaning of the Fifth Amendment. *Garner, supra.*

Petitioners' further contention (Pet. 9) that the registration provisions of the Act were unconstitutional because mere registration under the Act creates a threat of prosecution is without merit. Petitioners rely on this Court's decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, holding that members of the Communist Party could refuse to file a registration statement that inquired into "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime" (382 U.S. at 79), and on *Marchetti* v. *United States,* 390 U.S. 39, 48-49, 57 and *Grosso* v. *United States,* 390 U.S. 62, 66-68, holding that the registration requirements of the occupational and excise taxes on gambling, which required disclosures only by gamblers, the great majority of whom were likely to incriminate themselves by responding, were unconstitutional. This case is, however, entirely different.

The registration forms are not directed at a group of people "inherently suspect of criminal activities" *Marchetti* v. *United States, supra,* 390 U.S. at 57. Cf. *Haynes* v. *United States,* 390 U.S. 85; *Leary* v. *United States,* 395 U.S. 6. The Act merely requires agents of foreign principals to submit short-form registration statements to inform the government of their activities on behalf of foreign governments or political parties. 22 U.S.C. 611(b)(1). The purpose of this disclosure is to inform the public of the identity of foreign agents and the purposes for which they act. H.R. Rep. No. 1470, 89th Cong., 2d Sess. 2 (1966); *Attorney General* v. *Irish Northern Aid Committee, supra,* 346 F. Supp. at 1390. Like the taxpayer in *Garner,* petitioners were not exposed to a hazard of self-incrimination merely by completing the forms.[2]

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[2]Since the registration statements filed under the Foreign Agents Registration Act, like tax returns, are not directed at individuals "inherently suspect of criminal activities," petitioners would presumably not have had a right to refuse altogether to file a statement which at a minimum disclosed their identities as agents of some foreign principal. Since petitioners, like the taxpayer in *Garner,* had adequate means to file the form and not disclose the information subsequently used against them, it is unnecessary to decide—as it was unnecessary to decide in *Garner*—whether petitioners would have had immunity against the use of the mere fact of their having filed a statement if that fact subsequently proved relevant in a criminal prosecution. In view of the important regulatory, non-criminal purposes of the statute, *California* v. *Beyers, supra,* would suggest that foreign agents who file information, even under compulsion, might not have immunity from the use of that information in a criminal proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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